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Sup.Ct.

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1943

No. 32

CONSUMERS IMPORT CO., INC., ET AL.,
PETITIONERS,

vs.

KABUSHIKI KAISHA KAWASAKI ZOSENJO AND
KAWASAKI KISEN KABUSHIKI KAISHA

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT
OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR CERTIORARI FILED APRIL 3, 1943.

CERTIORARI GRANTED MAY 10, 1943.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1943

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PETITIONERS,

v.s.

KABUSHIKI KAISHA KAWASAKI ZOSENJO AND
KAWASAKI KISEN KABUSHIKI KAISHA

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OF APPEALS FOR THE SECOND CIRCUIT

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**IN UNITED STATES DISTRICT COURT, SOUTHERN
DISTRICT OF NEW YORK**

IN THE MATTER OF THE PETITION OF KABUSHIKI KAISHA KAWASAKI ZOSENJO, Owner, and Kawasaki Kisen Kabushiki Kaisha, Bareboat, Charterer of the Steamship "Venice Maru," for exoneration from and limitation of liability, Petitioners-Appellees,

CONSUMERS IMPORT CO., Inc., et al., Cargo Claimants-Appellants.

[fol. 12] **PETITION OF KABUSHIKI KAISHA KAWASAKI ZOSENJO
AND KAWASAKI KISEN KABUSHIKI**

To the Honorable the Judges of the United States District Court for the Southern District of New York:

The petition of Kabushiki Kaisha Kawasaki Zosenjo, Owner, and Kawasaki Kisen Kabushiki Kaisha, bareboat charterer of the Steamship "Venice Maru" in a cause of limitation of liability, civil and maritime, alleges on information and belief, as follows:

First. That, at all times hereinafter mentioned, the petitioner, Kabushiki Kaisha Kawasaki Zosenjo, was and now is a corporation organized under the laws of the Empire of Japan, with its head office located at Higashi Kawasaki-cho, Kobe, Japan, and was and now is the owner of the Steamship "Venice Maru."

Second. That at all times hereinafter mentioned the petitioner, Kawasaki Kisen Kabushiki Kaisha, was and now is a corporation organized under the laws of the Empire of Japan, with its head office at No. 8 Kaigan Dori, Kobe, Japan, and was and now is bareboat charterer of the said Steamship "Venice Maru," and manned, victualled and navigated said vessel within the meaning of Section 4286 of the Revised Statutes of the United States.

Third. The "Venice Maru" is a steel freight steamship of 6571.25 tons gross, 4013.48 tons net register, 405 feet long between perpendiculars, 53 feet beam and 37 feet

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moulded depth to awning deck, built in Kobe, Japan, in 1929. The vessel is of the Three Island type with raised forecastle and poop, has six cargo hatches, each leading to upper and lower tween decks and lower hold. Nos. 1, 2 and 3 hatches are forward of the engine room and Nos. 4, 5 and 6 are aft. Each of said cargo spaces was at all times herein mentioned furnished with an adequate number of [fol. 13] metal ventilators extending to the weather deck of the vessel which were maintained in good order and condition.

The petitioners used due diligence to make said vessel seaworthy and, until the fire hereinafter mentioned occurred, she was tight, staunch, strong, fully manned, equipped and supplied, and in all respects seaworthy and fit for the service in which she was engaged.

Fourth. On July 13, 1934, the "Venice Maru" loaded with general cargo which she had taken aboard at Dairen, Shanghai, Keelung, Kobe, Nagoya, Shimizu and Yokohama, left Yokohama, Japan, bound for New York via Los Angeles and the Panama Canal. She was under the command of a competent and experienced master and was manned by competent and experienced officers and crew, and her cargo was well and properly stowed. She carried wood oil in bulk in her deep tanks located in lower hold No. 4, raw silk in the silk rooms in No. 2 and No. 5 tween decks, sardine meal in bags in lower hold No. 1, lower hold No. 3, lower tween decks No. 3 and in lower hold No. 6. Her other compartments were loaded with general cargo including tea, canned goods, cotton goods, wool, porcelain, toys, bamboo poles, etc. On the voyage due care was given to the ventilation of the cargo and whenever weather permitted one-third of the hatch boards covering the hatches were removed for the purpose of ventilation.

The vessel arrived at Quarantine, Los Angeles, on July 29th, 1934, at 8:45 A. M. and discharged certain cargo out of Nos. 1, 2, 3 and 6 hatches, and sailed for Balboa, Canal Zone, the same day at 9:35 P. M. The ship was then in good order and condition and the cargo apparently so.

On August 6th at 7:40 A. M., the vessel then being about three days distant from Balboa, Canal Zone, the ship's officers observed smoke coming out of the ventilators leading to No. 1 hold. The crew was mustered and ordered to shift the deck cargo and tween deck cargo in order to locate

[fol. 14] the fire. This work continued steadily until 7:40 P. M. when the officers entered No. 1 lower hold and found that bags of sardine meal stowed therein were heating and giving off smoke. Heated bags of sardine meal were removed to the deck until 9 P. M. when work stopped for the day, watchmen being stationed at the hatch of No. 1 hold throughout the night and two wind sails being rigged to assist in cooling the cargo.

At 8 A. M. on August 7th, the crew resumed its work of shifting the cargo from the lower hold No. 1 to the deck and this work continued steadily until 6 P. M. when it was stopped after 700 bags of sardine meal had been so shifted. Four men were stationed on watch in the hold during the night of August 7th—8th and the next day.

At 6 P. M. on August 8th, the smoke in No. 1 lower hold was found to be increasing and all hands were mustered and put to work shifting the cargo and pouring water on the bags that were too hot to be handled. At 8:10 P. M., it became impossible to continue work in the hold on account of the heavy smoke fume and heat (the temperature of the bags then being 245° Fahrenheit). The Captain, considering that the entire venture was in imminent peril of destruction by fire, ordered the hatch and ventilators leading to this hold closed and water pumped into the hold.

A careful watch was kept through the night and the succeeding day and the crew continued to pour water into the hold by hose. At 6:30 A. M. on August 9th soundings showed 6 ft. 10 inches of water in the port bilge of No. 1 and 5 ft. 7 inches in the starboard bilge. At 3:35 P. M. the vessel cast anchor at Quarantine Station, Balboa, and the fireboat "Gorgona," which had been summoned by wireless, came alongside and started pumping water into No. 1 hold under direction of the Master of the "Venice Maru" in an endeavor to extinguish the fire in the hold. Flames as well as smoke were then visible. Soundings of No. 1 hold [fol. 15] at 4:25 P. M. showed 11 ft. of water, and at five o'clock 17 ft. of water, at which latter time the hatch was opened. At 5:20 P. M. flames were observed on the port side of the lower tween deck. At 7 P. M. anchor was raised and the ship proceeded to Balboa where she started to discharge cargo from Nos. 1 and 2 deck loads.

Water was continued to be poured into No. 1 hold until 2 A. M. on August 10th when it was stopped and the hatch was closed. At 2:25 P. M., under orders of the Harbor

Master, the vessel proceeded to the explosive anchorage off Panama where she anchored and thereafter resumed discharging cargo at No. 1 hatch. At 8 A. M. the fireboat "Favorite" came alongside and at 8:20 A. M. the steam valves of No. 1 shelter deck were opened and steam turned into the hold to attempt to extinguish the fire. At 10:30 A. M. the steam valves were shut off, the hatch was opened and the "Favorite" then proceeded to pour water into the hold. At 2 P. M. the hatch was closed and the steam valves were again turned on in the hope of finally extinguishing the fire.

At 6:30 P. M. the Captain of the "Favorite" came aboard and the "Venice Maru" thereupon raised anchor and proceeded to her berth where the Fireboat "Gorgona" came alongside. The firemen kept watch throughout the night and the steam valves into the shelter deck were kept open until 6:40 A. M. on August 11th when the No. 1 hatch was opened and hose was played on the burning cargo. This continued until 3 P. M. on August 11th when the fire was finally extinguished and the fireboat left.

Thereafter the petitioners appointed Messrs. Johnson & Higgins as Average Adjusters, and security was taken from the sound cargo to cover its proportion of the general average. The damaged cargo was removed from the ship, reconditioned as far as possible and thereafter restowed to be carried on to destination. Some of the damaged cargo, [fol. 16] including certain of the fish meal in No. 1 lower hold, was ordered destroyed by the Panama Canal Health Authorities, and some was left on dock at Panama Canal and later transshipped to destination. The ship itself was inspected by the surveyor of Lloyds Register of Shipping and allowed to proceed to destination.

On August 28th the vessel left Balboa, proceeded through the Canal and arrived at Cristobal at 9:40 P. M. of that day. After discharging certain cargo at Cristobal, she sailed for New York on August 29th at 3:35 P. M. where she arrived at Quarantine on September 5th at 8:30 A. M. and at her berth at Thirty-Third Street Wharf, Brooklyn, at 10 A. M. at which port she discharged certain of her cargo and then proceeded to Philadelphia and other Atlantic ports to discharge other cargo, after which she loaded cargo for the Far East at various United States Atlantic and Gulf ports and proceeded to Japan.

Fifth. As a result of the aforesaid fire and the steps taken to extinguish it, a large quantity of the cargo was damaged or destroyed. The "Venice Maru" and her equipment suffered damage in the estimated amount of \$15,000.

Sixth. The losses, damages and destruction sustained by the vessel and its cargo by reason of the premises were not caused or contributed to by any fault, negligence or want of care or design on the part of the "Venice Maru," her owner or bareboat charterer, the petitioners herein or any one for whom the said petitioners may be responsible, but were due solely to fire.

Seventh. Said losses, damages and destruction were occasioned and incurred without the privity or knowledge of petitioners.

[fol. 17] Eighth. At the present time the petitioners do not know the amount of claims for such losses, damages and destruction.

Proceedings have already been begun against the petitioners and/or the "Venice Maru" for damages alleged to have been sustained by reason of the matters alleged herein as set forth in Schedule "A" annexed to this petition and made a part hereof.

In addition to the proceedings referred to in Schedule "A," a number of claims or notices of claims have been presented to the petitioners for loss of or damage to cargo as set forth in Schedule "B" annexed to this petition and made a part hereof. The petitioners expect that other claims will be presented against them and that other suits will be begun by the owners of cargo alleged to have been damaged in the fire and by underwriters insuring said cargo. The demands already made against the petitioners in behalf of various claimants probably amount to upwards of \$300,000 as nearly as can now be estimated inasmuch as some notices of claim state no amount.

Ninth. There are no demands unsatisfied liens or claims of liens against the said "Venice Maru," her engines, boilers, etc., or any suits pending thereon, so far as is known to petitioners, except as above set forth.

Tenth. The Steamship "Venice Maru" was damaged in the fire and the steps taken to extinguish the fire, and her value at the end of the voyage in said damaged condi-

tion was not in excess of \$165,000. The freight pending for the transportation of cargo on board the "Venice Maru", on the voyage during which the aforesaid fire occurred amounted to \$80,000. No passengers were carried and no passage money paid. The share of the general average expenses chargeable to the ship and the collect freight [fol. 18] amounted to approximately \$65,000. Petitioners are advised that the entire aggregate value of the interest of petitioners in said Steamship "Venice Maru" and her pending freight, does not exceed the sum of \$180,000. Subject to an appraisal of petitioners' interest on a reference, petitioners offer an ad interim stipulation for value in the sum of \$245,000, said sum being in excess of the aggregate value of petitioners' interest in said vessel, her equipment and her pending freight.

Eleventh. Petitioners claim exemption from liability for the losses, damages and destruction occasioned or incurred by or resulting from the aforesaid fire and the steps taken to extinguish said fire and/or subsequent damages and for the claims for damages that have been or may hereafter be made, and petitioners allege that they have valid defenses thereto on the facts and on the law and under the provisions of the contracts for the carriage of cargo, the terms of which contracts will more fully appear upon the trial of this proceeding. Petitioners further claim the benefit of the limitation of liability provided in Sections 4281, 4282, 4283, 4284, 4285 and 4286 of the Revised Statutes of the United States and the various statutes supplemental thereto and amendatory thereof, and to that end petitioners are ready and willing to give a stipulation with sufficient surety for the payment into Court of the amount or value of the petitioners' interest in the "Venice Maru" and her pending freight whenever the same has been ordered by this Court, as provided by the aforesaid statutes and by General Rules Nos. 51 and 54 in Admiralty and by the rules and practice of this Honorable Court.

Twelfth. All and singular the premises are true and within the admiralty and maritime jurisdiction of the United States and of this Honorable Court.

[fol. 19] Wherfore, petitioners pray:

(1) That this Court cause due appraisement to be made of the amount or value of petitioners' interest in the Steam-

ship "Venice Maru" and her pending freight for the afore-said voyage.

(2) That the Court make an order directing the petitioners to file a stipulation with surety to be approved by the Court for the payment into Court of the amount of petitioners' said interest whenever the Court shall so order.

(3) That the Court make an order directing the issuance of a monition to all persons claiming damages for any and all loss, damage, injury or destruction done, occasioned or incurred by or resulting from the said fire on the "Venice Maru" and steps taken to extinguish said fire upon the voyage hereinbefore described, citing them to appear before a Commissioner to be named by the Court in said order and make due proof of their respective claims, and also to appear and answer the allegations of this petition according to the law and practice of this Court at or before a certain time to be fixed by the monition.

(4) That the Court make an order directing that, on the giving of such stipulation as may be determined to be proper, or of an *ad interim* stipulation, an injunction shall issue restraining the prosecution of all actions, suits and proceedings already begun to recover for damages sustained on the voyage aforesaid and arising out of, occasioned by or consequent upon the fire and the steps taken to extinguish the same on the "Venice Maru" as stated in this petition, and the commencement or prosecution hereafter of any suit, action or legal proceeding of any nature or description whatsoever, except in the present proceeding against petitioners or either of them or their agents or representatives or any other person whatsoever or the "Venice Maru" in respect of any claim or claims arising [fol. 20] out of the aforesaid voyage and fire and the steps taken to extinguish said fire on the "Venice Maru."

(5) That the Court in this proceeding will adjudge that the petitioners and each of them are not liable to any extent for any loss, damage or injury, nor for any claim whatsoever in any way arising out of or in consequence of the fire above described or in consequence of the aforesaid voyage; or, if petitioners or either of them shall be adjudged liable, then that such liability be limited to the amount or value of petitioners' interest in the "Venice Maru" at the end of the voyage on which she was engaged

at the time of the fire described in this petition and her pending freight, if any, and that the money paid or secured to be paid as aforesaid be divided pro rata among such claimants as may duly prove their claims before the Commissioner hereinbefore referred to, saving to all parties any priorities to which they may be legally entitled, and that a decree may be entered discharging petitioners and each of them from all further liability.

(6) That petitioners may have such other and further relief as the justice of the cause may require.

Crawford & Sprague, Proctors for Petitioners, Office and P. O. Address, 117 Liberty Street, New York, N. Y.

(Verified by George C. Sprague, as one of the Proctors for Petitioners on November 15, 1934.)

(Schedules "A" and "B", attached to the petition, giving the names of the parties who had filed suit and the names of the parties who had filed claims or notices of claims, are omitted by agreement.)

[fol. 21] IN UNITED STATES DISTRICT COURT

ORDER OF BONDY, D. J., RE AD INTERIM STIPULATION—
November 17, 1934

Present: Honorable William Bondy, District Judge.

Kabushiki Kaisha Kawasaki Zosenjo, and Kawasaki Kisen Kabushiki Kaisha having filed a petition for the limitation of petitioners' liability as owner and bareboat charterer respectively of the Steamship "Venjee Maru," and having prayed for an appraisal of the value of petitioners' interest in said vessel and her pending freight, if any, and for leave to file a stipulation for the amount of said appraised value or for an ad interim stipulation pending the appraisal of petitioners' interest in said vessel and her pending freight, if any, by a Commissioner to be appointed by this Court, and it appearing from the affidavit of Francis A. Martin, verified November 10, 1934, that the value of said vessel and her equipment as of September 5, 1934, was

\$160,000; and from the affidavit of Charles E. Ross, verified November 10, 1934, that the value of said vessel and her equipment as of September 5, 1934, was \$165,000; and from the affidavit of Robert S. Haight that the value of said vessel and her equipment as of September 5, 1934, was \$164,000; and if appearing from the affidavit of T. Yajima, Representative in New York of the petitioner Kawasaki Kisen Kabushiki Kaisha, verified November 15, 1934, and filed here [fol. 22] with, that the pending freight on said vessel at the termination of the voyage in which she was engaged at the time of the disaster mentioned in the petition filed herein is \$80,000, making a maximum total of \$245,000 for the value of the vessel and her equipment and pending freight.

Now, on motion of Crawford & Sprague, Proctors for the petitioners, it is,

Ordered that the petitioners file herein an ad interim stipulation for the value of said vessel and equipment and pending freight in the sum of \$245,000 with interest from the 5th day of September, 1934, the date of the termination of the voyage on which the disaster occurred, with surety, according to the rules and practice of this Court; and it is further

Ordered that any party may apply to have the amount of said stipulation increased or diminished as the case may be on the filing of the report of the Commissioner appointed to appraise the amount or value of petitioners' interest in said vessel and her pending freight, if any, or on the ultimate determination of the Court or exceptions to the Commissioner's report.

William Bondy, U. S. D. J.

[fol. 23] IN UNITED STATES DISTRICT COURT

AD INTERIM STIPULATION

Whereas, Kabushiki Kaisha Kawasaki Zosenjo, as Owner, and Kawasaki Kisen Kabushiki Kaisha, as Bareboat Charterer of the Steamship "Venice Maru" have instituted a proceeding in this Court for limitation of liability as such owner and bareboat charterer respectively, in respect of a fire which occurred on August 6th to 11th, 1934, while said vessel was at sea and the consequent damage

which is more particularly set forth in their petition filed herein on November 16, 1934, in which the petitioners prayed, among other things, that the Court will cause due appraisement to be made of the amount or value of their interest in said vessel and her pending freight, if any, upon a reference to be ordered herein and that a monition may issue to all persons claiming damages for loss, damage, injury or destruction by or resulting from said fire, citing them to appear before the Commissioner to be appointed by this Court and make due proof of their respective claims, and to answer the petition herein and that an injunction issue restraining the prosecution of any and all actions, claims or proceedings except under and in pursuance of the provisions of the monition granted herein; and

Whereas the petitioners wish to prevent further prosecution of all proceedings already instituted against the petitioners or the Steamship, "Venice Maru" and the commencement of prosecution thereafter of any and all suits, actions or legal proceedings of any nature or description whatever in any and all Courts, and also wish to provide an ad interim stipulation for value as security for claimants pending the ascertainment by reference of the amount of the petitioners' interest in said vessel and her pending freight, if any;

[fol. 24] Now Therefore, in consideration of the premises, the Standard Surety & Casualty Company of New York, having an office and place of business at 80 John Street, Borough of Manhattan, City of New York, hereby undertakes in the sum of Two Hundred Forty Five Thousand and 00/100 (\$245,000.00) Dollars, with interest from September 5th, 1934, that the petitioners will pay into Court within ten (10) days after the entry of an order confirming the report of the Commissioner to be appointed to appraise the amount or value of the petitioners' interest in said vessel and her pending freight, if any, the amount or value of such interest as thus ascertained, or will file in this proceeding a bond or stipulation for value in the usual form, with surety in said amount, and that, pending the payment into Court of the amount or value of the petitioners' interest in said vessel and her pending freight, if any, so ascertained, or on giving of a stipulation for value therefor, this stipulation shall stand as security for all claims in said limitation proceeding. Said Surety Company hereby submits

itself to the jurisdiction of the Court and agrees to abide by all orders of the Court, interlocutory and final, and to pay the amount awarded by the final decree entered by this Court or by an Appellate Court if an appeal intervene with interest, unless the amount or value of the petitioners' interest in said vessel and her pending freight, if any, shall be paid into Court by the petitioners, or a stipulation for value therefor shall be given as aforesaid in the meantime, in which event this stipulation to be void.

*Dated, New York, November 16th, 1934.

Standard Surety & Casualty Company of New York,
by: John R. English, Vice President.

Attest: Walter E. Makosky, Asst. Secretary.

[fol. 25] STATE OF NEW YORK,
County of New York, ss:

On this 16 day of November, 19³⁴, before me personally appeared Walter E. Makosky, Asst. Secy. of the Standard Surety & Casualty Company of New York, with whom I am personally acquainted, who, being by me duly sworn, said: that he resides in the State of New Jersey; that he is Asst. Secy. of the Standard Surety & Casualty Company of New York, the corporation described in and which executed the foregoing instrument; that he knows the corporate seal of the said Company; that the seal affixed to said instrument is such corporate seal; that it was so affixed by order of the Board of Directors of said Company; and that he signed his name thereto as Asst. Secy. by like authority; and the said Walter E. Makosky further says that he is acquainted with John R. English and knows him to be the Vice-Pres. of said Company; that the signature of the said John R. English subscribed to said instrument is in the genuine handwriting of the said John R. English and was thereto subscribed by like order of said Board of Directors and in the presence of him, the said Walter E. Makosky and that the liabilities of said Company do not exceed its assets, as ascertained in the manner provided in Chapter 33 of the Laws of 1909, constituting Chapter 28 of the Consolidated Laws of the State of New York, and known as the Insurance Law.

Leo J. Guilfoyle, Notary Public.

[fol. 26] IN UNITED STATES DISTRICT COURT

ORDER DIRECTING ISSUANCE OF MONITION—November 17, 1934

Present: Honorable William Bondy, District Judge.

A petition having been filed herein on November 16, 1934, by Kabushiki Kaisha Kawasaki Zosenjo, Owner, and Kawasaki Kisen Kabushiki Kaisha, Bareboat Charterer of the freight Steamship "Venice Maru" claiming the benefit of the limitation of liability provided for in Sections 4281, 4282, 4283, 4284, 4285 and 4286 of the Revised Statutes of the United States and the statutes supplementary thereto and amendatory thereof, and also contesting their liability independently of the limitation of liability claimed under said Act for any loss, damage, injury or destruction sustained during or resulting from fire and the efforts used to extinguish the same on board the "Venice Maru" on August 6th, 7th, 8th, 9th, 10th and 11th, 1934, and said petition also stating the facts and circumstances on which said exemption from or limitation of liability was claimed, and on reading and filing the affidavits of value of the "Venice Maru" and her pending freight sworn to on November 10 and 15, 1934, and filed herein November 16, 1934, and the ad interim stipulation for value executed November 16, 1934, by The Standard Surety & Casualty Company of New York, in the sum of \$245,000 with interest from September 5, 1934, filed herein November 16, 1934, undertaking to pay into Court within ten (10) days after [fol. 27] the entry of an order confirming the report of a Commissioner to be appointed to appraise the amount or value of petitioners' interest in the "Venice Maru" and her pending freight, if any, the amount or value of such interest as thus ascertained, or to file in this proceeding a bond or stipulation for value in the usual form with surety in said amount and that, pending the payment into Court of the amount or value of petitioners' interest in the "Venice Maru" and her pending freight as ascertained or the giving of a stipulation for the value thereof, said bond shall stand as security for all claims in this proceeding;

Now, on motion of Crawford & Sprague, proctors for petitioners, it is

Ordered that a monition issue out of and under the seal of this Court against all persons claiming damages for any

and all losses, damages, injuries or destruction occasioned by, arising out of or consequent upon the fire which occurred on board the said freight steamship "Venice Maru" during the voyage described in the petition and the efforts made to extinguish said fire, and against all persons having any claim against the said "Venice Maru" or her pending freight, if any, citing them to appear before this Court and make due proof of their ~~prospective~~ claims on or before the 31st day of December, 1934 at 10:30 o'clock in the forenoon and Godfrey Updike, Esq. is hereby appointed the Commissioner to whom proof of all claims which shall be presented in pursuance of said monition shall be made, subject to the right of any person to controvert and question the same, with liberty also to any person or persons claiming damages as aforesaid who shall have presented his or their claims to said Commissioner under oath to answer said petition; and it is further

*Ordered that public notice of said monition be given by publication thereof in the New York Post, a newspaper published in the Borough of Manhattan, City of New York, once a week until the return of said monition, the first publication to be at least thirty (30) days before said return day, and that a copy of said monition be served on the respective attorneys or proctors for all persons who at the time of making this order shall have filed libels or begun actions or suits for damage, loss or injury occasioned by, arising out of or consequent upon the fire aforesaid, together with a copy of this order, such last mentioned service to be made at least thirty (30) days before the return day; and it is further

Ordered that petitioners, not later than the day of the second publication of said notice, shall mail a copy of the monition to every person known to have asserted any claim against the vessel or petitioners or either of them, and to his proctor or attorney if known; and it is further

Ordered that the beginning or prosecution of any and all suits, actions, or proceedings, of any nature or description whatsoever except in the present proceeding, in respect of any claim occasioned by, arising out of, consequent upon or in connection with the aforesaid fire on the "Venice Maru" during the voyage described in the petition, be and they hereby are stayed and restrained until the hearing and determination of this proceeding; and it is further

Ordered that service of this order as a restraining order be made within this District in the usual manner or in any other District by the United States Marshal for such District delivering a copy of this order to the person or persons to be restrained, or to his or their respective proctors or attorneys.

Wm. Bondy, U. S. D. J.

[fol. 29] IN UNITED STATES DISTRICT COURT

MONITION

The President of the United States of America to the Marshal of the United States for the Southern District of New York, Greeting:

Whereas, a petition was filed in the District Court of the United States for the Southern District of New York on November 16th, 1934, by Kabushiki Kaisha Kawasaki Zosenjo and Kawasaki Kisen Kabushiki Kaisha, praying for exoneration for and limitation of their liability, and the liability of any other person or party interested in the freight Steamship *Venice Maru* concerning the loss, damage, injury or destruction done, occasioned or incurred by or resulting from a fire at sea on board the S. S. *Venice Maru* from August 6th to 11th, 1934, for the reasons mentioned in the petition and praying that a monition issue out of this Court citing all persons claiming damages for any loss, damage, injury or destruction to appear before this Court and make due proof of their respective claims, and answer the allegations of said petition and that, if it shall appear that petitioners are not liable for any such loss, damage, injury or destruction, it may be so decreed by this Court; and

Whereas, the petitioners have filed in the office of the Clerk of this Court an *ad interim* stipulation in the sum of \$245,000 with interest from September 5, 1934, executed on November 16th, 1934, by The Standard Surety & Casualty Company of New York, undertaking to pay into Court within ten (10) days after the entry of an order confirming the report of a Commissioner to be appointed to appraise the amount or value of petitioners' interest in the S. S. *Venice Maru* and her pending freight, if any, the amount or value of such interest as thus ascertained, or to

file in this proceeding a bond or stipulation for value in the usual form with surety in said amount, and the said Court having directed by an order made and entered on November [fol. 30] 19th, 1934, that a monition issue against all persons claiming damage for any and all losses, damages, injuries or destruction occasioned during, resulting from or consequent upon the fire and loss aforesaid, citing them to appear before this Court and make due proof of their respective claims on or before December 31st, 1934 at 10:30 A. M., and Godfréy Updike, Esq., having been appointed Commissioner before whom proof of all claims which shall be presented in pursuance of said monition shall be made;

You are, therefore, commanded to cite all persons claiming damage for any loss, damage, injury or destruction done, occasioned or incurred on said voyage of said S. S. *Venice Maru* and all persons claiming damages or liens against the S. S. *Venice Maru* to appear before this Court and make due proof of their respective claims before Godfrey Updike, Esq., Commissioner, at his office 150 Broadway, Borough of Manhattan, City of New York, on or before December 31st, 1934, at 10:30 o'clock in the forenoon; and

You are also commanded to cite such claimants to appear and answer the petition herein on or before the last named date, or within such further time as this Court may grant, and to have and receive such relief as may be due;

And what you have done in the premises do you then make return to this Court, together with this writ.

Witness the Honorable John C. Knox, Judge of the District Court of the United States for the Southern District of New York, this 20th day of November, One Thousand Nine Hundred and Thirty Four and of the Independence of the United States the One Hundred and Fifty Ninth.

Charles Weiser, Clerk. (Seal.)

[fol. 31] IN UNITED STATES DISTRICT COURT

ANSWER OF CONSUMERS IMPORT CO., INC., TO PETITION

To the Honorable the Judges of the United States District Court for the Southern District of New York:

The answer of Consumers Import Co., Inc., on its own behalf, and on behalf of all other claimants similarly situated, to the Petition of Kabushiki Kaisha Kawasaki Zosenjo and Kawasaki Kisen Kabushiki Kaisha, as owner and alleged bare-boat charterer of the steamship "Venice Maru," in a cause of limitation of liability, civil and maritime, alleges and respectfully shows to this Honorable Court, as follows:

First: Your respondent above named, a corporation duly organized, created and existing under and by virtue of the laws of the State of New York, is a claimant in the above entitled limitation proceedings and has heretofore duly filed its appearance and verified claim with Godfrey Updike, Esq., who has been appointed by this Court as the Commissioner in these proceedings before whom proof of all claims shall be presented.

Second: Your respondent admits the truth of the allegations contained in the First Article of the petition.

Third: Your respondent admits that at all times mentioned in the petition the petitioner, Kawasaki Kisen Kabushiki Kaisha, was, and now is, a corporation organized under the laws of the Empire of Japan with its head office at Kobe, Japan.

Your respondent denies any knowledge or information sufficient to form a belief as to the truth of the other allegations contained in the Second Article of the petition and calls for strict proof thereof, if the same be deemed material.

[fol. 32] Fourth: Your respondent admits that the steamship "Venice Maru" is a steel freight steamship of the Three Island type with raised forecastle and poop and that it has six cargo hatches, each leading to upper and lower 'tween decks and lower holds; that Nos. 1, 2 and 3 hatches are forward of the engine room and Nos. 4, 5 and 6 hatches are aft.

Your respondent specifically denies that each of the cargo spaces on the "Venice Maru" was, at all times mentioned in the petition, furnished with an adequate number of metal ventilators extending to the weather deck of the vessel which were maintained in good order and condition and that the petitioner used due diligence to make said vessel seaworthy and that until the fire mentioned in the petition occurred she was tight, staunch, strong, fully manned, equipped and supplied and in all respects seaworthy and fit for the service in which she was engaged, as is alleged in the Third Article of the petition.

Your respondent denies any knowledge or information sufficient to form a belief as to the truth of each and every other allegation contained in the Third Article of the petition and calls for strict proof thereof if the same be material.

Fifth. Your respondent admits that in July of 1934, the "Venice Maru," loaded with general cargo which she had taken aboard at Dairen, Shanghai, Kelung, Kobe, Nagoya, Shimizu and Yokohama left Yokohama, Japan, bound for New York, via Los Angeles and the Panama Canal; that she carried wood oil in bulk in her deep tanks located in lower hold No. 4, raw silk in the silk rooms in Nos. 2 and 5 'tween decks, sardine meal in bags in lower hold No. 1, lower hold No. 3, lower 'tween decks No. 3 and in lower hold No. 6; that her other compartments were loaded with general cargo, including tea, canned goods, cotton goods, wool, porcelain, toys, bamboo poles, etc.; a fire occurred on board said vessel while en route from Los [fol. 33] Angeles to Balboa; that subsequently the petitioners appointed Messrs. Johnson & Higgins as average adjusters; that security was taken from the sound cargo to cover its proportion of the alleged general average; that some damaged cargo was removed from the ship in the Canal Zone; that some of the damaged cargo, including certain of the fish meal in No. 1 lower hold, was ordered destroyed by the Panama Canal Health Authorities and some was left on dock at Panama Canal and later transshipped to destination; that on or about August 28th, the vessel left Balboa and proceeded through the Canal and arrived at Cristobal; and that after discharging certain cargo at Cristobal she sailed for New York where she arrived on or about September 5, 1934, at which port she

discharged certain of her cargo and then proceeded to Philadelphia and other Atlantic ports to discharge further cargo.

Your respondent specifically denies that the steamship "Venice Maru" on the voyage in question was under the command of a competent and experienced master and was manned by competent and experienced officers and crew and her cargo was well and properly stowed; that on the voyage due care was given to the ventilation of the cargo and that whenever weather permitted one-third of the hatch boards covering the hatches were removed for the purpose of ventilation; and that the said vessel was in good order and condition when she sailed from Los Angeles, as is alleged in the Fourth Article of the petition.

Your respondent denies any knowledge or information sufficient to form a belief as to the truth of each and every other allegation contained in the Fourth Article of the said petition and calls for strict proof thereof, if the same be material.

Sixth: Your respondent admits that as a result of the fire occurring on board the steamship "Venice Maru" during the course of the voyage referred to in the petition herein and as a result of the steps taken to extinguish it, [fol. 34] a large amount of the cargo being carried on the said vessel was damaged or destroyed.

Your respondent denies any knowledge or information sufficient to form a belief as to the truth of each and every other allegation contained in the Fifth Article of the petition herein and calls for strict proof thereof, if the same be material.

Seventh: Your respondent denies the truth of each and every allegation contained in the Sixth Article of the petition herein.

Eighth: Your respondent denies the truth of each and every allegation contained in the Seventh Article of the petition herein.

Ninth: Your respondent admits that at the time of the filing of the petition, the petitioners did not know the amount of claims for loss, damage and destruction sustained by cargo on the voyage referred to in the petition herein; that prior to the filing of the petition, proceed-

ings had been begun against the petitioner, Kawasaki Kisen Kabushiki Kaisha, and/or the steamship "Venice Maru" for damages sustained by reason of the matters alleged in said petition as set forth in Schedule A annexed to said petition and that in addition to the proceedings referred to in said Schedule A, a number of claims or notices of claims had been presented to the petitioners for loss of or damage to cargo.

Your respondent denies any knowledge or information sufficient to form a belief as to the truth of each and every other allegation contained in the Eighth Article of the petition herein and calls for strict proof thereof if the same be material.

Tenth: Your respondent denies any knowledge or information sufficient to form a belief as to the truth of each [fol. 35] and every allegation contained in the Ninth Article of the petition herein and calls for strict proof thereof, if the same be material.

Eleventh: Your respondent admits that the steamship "Venice Maru" was damaged in the fire and the steps to extinguish the fire.

Your respondent denies any knowledge or information sufficient to form a belief as to the truth of each and every other allegation contained in the Tenth Article of the petition herein and calls for strict proof thereof, if the same be material; and your respondent further begs leave to further answer the said allegations in the Tenth Article of the petition upon receiving definite information with respect to the value of the steamship "Venice Maru" and with respect to the amount of her pending freight.

Twelfth: Your respondent specifically denies that the petitioners are entitled to claim exemption from liability for the loss, damage and destruction occasioned or incurred by or resulting from the fire mentioned in the said petition and the steps taken to extinguish said fire and/or subsequent damages and for the claims for damages that have been or may be hereafter made and that the petitioners have valid defenses thereto on the facts and on the law and under the provisions of the contracts for the carriage of the cargo, and that the petitioners are entitled to claim the benefit of the limitation of liability provided in Sections 4281, 4282, 4283, 4284, 4285, and 4286 of the

Revised Statutes of the United States and the various statutes supplemental thereto and amendatory thereof, as is alleged in the Eleventh Article of the petition.

Your respondent denies any knowledge or information sufficient to form a belief as to the truth of each and every other allegation contained in the Eleventh Article of the petition and calls for strict proof thereof, if the same be material.

[fol. 36] Thirteenth: Your respondent admits the admiralty and maritime jurisdiction of the United States and of this Honorable Court, but specifically denies that all and singular the premises of the petition are true, as is alleged in the Twelfth Article of the said petition.

Further answering the petition, your respondent alleges as follows:

Fourteenth: During the months of June and July, 1934, various shipments of merchandise, then in good order and condition, were delivered to the petitioner, Kawasaki Kisen Kabushiki Kaisha, and were thereafter shipped and placed on board the steamship "Venice Maru" for carriage from various Far Eastern ports to various American and Latin-American ports where the said merchandise was to be delivered in like good order and condition as when shipped, in consideration of an agreed freight and in accordance with the valid terms of certain bills of lading duly issued by the petitioner, Kawasaki Kisen Kabushiki Kaisha, and/or by the duly authorized agents or representatives of the said petitioner and of the aforesaid steamship "Venice Maru" to cover the said merchandise.

Fifteenth: Thereafter, the said steamship "Venice Maru," having the said merchandise on board, sailed from the respective ports of shipment and subsequently arrived at the respective ports of discharge ~~where~~ the said steamship "Venice Maru" discharged the said shipments, but not in like good order and condition as when delivered to the said vessel and to the said petitioner, Kawasaki Kisen Kabushiki Kaisha, at the said ports of shipment, but short, slack, broken and seriously injured and damaged and otherwise not in like good order and condition as when shipped and/or that a portion or the whole of some of said shipments has not been delivered to the owners thereof and/or

[fol. 37] to the claimants herein at the ports of discharge named in the bills of lading or at any other port.

Sixteenth: That despite the fact that the bills of lading issued by the petitioner, Kawasaki Kisen Kabushiki Kaisha; and/or by the duly authorized agents and representatives of the said petitioner and of the said steamship "Venice Maru" to cover the shipments made at Nagoya and/or at Yokohama were all clean bills of lading and contained no special provisions, providing for or allowing stowage of the cargo on deck, certain shipments of chinaware, curios and porcelain which were shipped on board the steamship "Venice Maru" at Nagoya, Japan, and/or at Yokohama, Japan, were stowed and carried on the voyage in question as deck cargo.

Seventeenth: The breach of the aforesaid contracts of affreightment and the loss, injury and damage sustained by the shipments above referred to were not caused or contributed to by any fault of neglect of the shippers of the said cargo or the claimants in this proceeding, but were wholly due to the fault, neglect and want of care of the petitioners in the proper stowage, care and custody of the said cargo and/or in furnishing a seaworthy vessel for the transportation of said cargo.

Eighteenth: Prior to the arrival of the steamship "Venice Maru" at the ports of discharge named in the respective bills of lading, the claimants in this proceeding became the owners of the merchandise above referred to and also became the owners and holders for value of the bills of lading covering the said merchandise and thereby became entitled to the delivery of the said merchandise in like good order and condition as when delivered to the petitioner, Kawasaki Kisen Kabushiki Kaisha, and to the said steamship "Venice Maru" for carriage as aforesaid.

[fols. 38-48] Nineteenth: The claimants in this proceeding and/or their agents have duly performed all valid terms and conditions of the contracts of carriage on their part to be performed.

Twentieth: All and singular the premises are true and within the admiralty and maritime jurisdiction of the United States and of this Honorable Court.

Wherefore your respondent, on its own behalf, and on behalf of all other claimants similarly situated, prays that

the claims filed herein be allowed; that the petition filed herein be denied; and that this Court will grant such other and further relief as may be just and proper in the premises.

Bigham, Englar, Jones & Houston, Proctors for Claimants, Office and P. O. Address, No. 99 John Street, New York City.

(Verified by James Tasley, as President of Consumers Import Co., Inc., one of the claimants, on December 28, 1934.)

[fols. 49-56] IN UNITED STATES DISTRICT COURT

INTERROGATORIES ATTACHED TO CLAIMANTS' ANSWER TO THE PETITION FOR LIMITATION AND SWORN ANSWERS THERETO BY Y. KAWASAKI, MANAGING DIRECTOR OF THE PETITIONER, KABUSHIKI KAISHA KAWASAKI ZOSENJO.

First Interrogatory: What, if any, general or special instructions or recommendations with respect to the manner or method of stowage and ventilation of sardine meal or fish scraps did the petitioners give to the master and/or other officers of the steamship "Venice Maru" at any time prior to the sailing of the steamship "Venice Maru" from Kobe on the voyage referred to in the petition herein as beginning at Yokohama on July 13, 1934.

Ans. Under the fleet bareboat charter which included the "Venice Maru," the petitioner, Kabushiki Kaisha Kawasaki Zosenjo, had nothing to do with the operation of that vessel or instructions to her Master. The vessel was operated, manned, victualed and navigated by the petitioner, Kawasaki Kisen Kabushiki Kaisha who appointed the Master.

Answers to Second to Eighty-first Interrogatories, inclusive. The petitioner, Kabushiki Kaisha Kawasaki Zosenjo, has no knowledge or information relating to these interrogatories as the vessel was bareboat chartered to Kawasaki Kisen Kabushiki Kaisha during this period and said charterer operated, manned, victualed and navigated her.

[fols. 57-58] IN UNITED STATES DISTRICT COURT

SUMMARIES OF STIPULATIONS OF FACT

Prior to the trial of this action, proctors for the petitioners and proctors for cargo claimants entered into certain stipulations of fact. The following are summaries of such stipulations:

A. Claimant, George Borgfeldt Corp., a New York corporation, was at all material times the owner and holder for value of the bill of lading issued by petitioner, Kawasaki Kisen Kabushiki Kaisha, to cover a shipment of 114 cases of earthenware received on board the steamship "Venice Maru" in apparent good order and condition for carriage from Nagoya to Baltimore. The said shipment was on board the steamship "Venice Maru" when she sailed from her Japanese ports of loading on the voyage referred to in the petition herein and was still on board said vessel at the time fire broke out in her No. 1 lower hold on or about August 6, 1934. Upon discharge at Baltimore the aforesaid shipment returned ex the steamship "Venice Maru" not in like good order and condition as when shipped, but seriously injured and damaged by reason of contact with water and steam. Said claimant has duly performed all valid conditions precedent contained in the bill of lading on its part to be performed.

* * * * *

[fol. 59] D. Claimants, Consumers Import Co. (a New York corporation), Albert B. Baker and William L. Bradley, copartners, trading under the firm name and style of Bradley & Baker, Charles M. Cox Co. (a Massachusetts corporation), and A. E. Buck, H. V. B. Smith, C. D. Rafferty and H. C. McCormick, copartners, trading under the firm name and style of H. J. Baker & Bro., were at all material times respectively the owners and holders for value of the respective bills of lading issued by petitioner, Kawasaki Kisen Kabushiki Kaisha, to cover the various shipments of sardine meal hereafter described. Said shipments were shipped in apparent good order and condition on board the steamship "Venice Maru" at Kobe by Mitsubishi Shoji Kaisha, Ltd. The quantity of sardine meal comprising the shipments referred to and the respec-

tive ports of discharge named in the bills of lading were as follows:

[fol. 60]

<i>Item</i>	<i>Merchandise</i>	<i>Port of Discharge</i>
1	2,000 bags sardine meal, said to weigh 200,000 pounds, marked CICO	New York
2	5,500 bags sardine meal, said to weigh 550,000 pounds, marked MTC	Boston
3.	2,000 bags sardine meal, said to weigh 200,000 pounds, marked MTC	New York
4	10,000 bags sardine meal, said to weigh 1,000,000 pounds, marked MTC	Jacksonville
5	1,000 bags sardine meal, said to weigh 100,000 pounds, marked MTC	New York
6	500 bags sardine meal, said to weigh 50,000 pounds, marked FOXCO	Philadelphia

According to the stowage plan of the steamship "Venice Maru" for the voyage referred to in the petition herein, the aforesaid shipments were stowed as follows:

(a) In #1 Lower Hold, the entire shipment of 2,000 bags identified above as Item #1, together with 4,805 bags from the shipment identified above as Item #2, 492 bags from the shipment identified above as Item #3, and 6,015 bags from the shipment identified above as Item #4, making a total of 13,312 bags of sardine meal stowed in that compartment.

(b) In #3 Tweendecks, 453 bags from the shipments identified above as Items #3 and #5 together with the entire shipment of 500 bags identified above as Item #6 and 5,116 bags marked N. M. consigned to [fol. 61-616] Hamburg, making a total of 6,069 bags of sardine meal stowed in that compartment.

(c) In #3 Lower Hold, 11,884 bags marked N. M. consigned to Hamburg.

(d) In #6 Lower Hold, 695 bags from the shipment described above as Item #2 together with 2,055 bags from the shipments described above as Items #3 and #5, and 3,985 bags from the shipment described above as Item #4, making a total of 6,735 bags of sardine meal stowed in that hold.

The aforesaid shipments were on board the steamship "Venice Maru" when she sailed from her Japanese ports of loading on the voyage referred to in the petition herein and were still on board said vessel at the time fire broke out in her No. 1 lower hold on or about August 6, 1934. The 2,000 bags comprising the entire shipment identified above as item No. 1, 4782 bags of the shipment identified above as item No. 2, 568 bags of the shipment identified above as item No. 3, and 6,238 bags of the shipment identified above as item No. 4, were never delivered by the steamship "Venice Maru" or by Kawasaki Kisen Kabushiki Kaisha to the shipper or to the owners thereof at the ports of discharge named in the bills of lading issued to cover the said shipments or at any other port. Whatever portions of the aforesaid shipments which were not delivered as aforesaid were either destroyed by the fire which broke out on the steamship "Venice Maru" on or about August 6, 1934; or were discharged from the said vessel at the Canal Zone in such a badly damaged condition, due to contact with water or steam, that they were dumped at that place as worthless. The shipments identified above as items 5 and 6 were delivered by the steamship "Venice Maru" in good order and condition at the ports of discharge named in the bills of lading issued to cover the same. Claimants above named have duly performed all valid conditions precedent contained in the bills of lading on their part to be performed.

[fol. 617] In UNITED STATES DISTRICT COURT

Excerpts from Statement of Evidence

SHOTARO KITAMURA, called as a witness on behalf of the petitioners, being first duly sworn testified as follows:

(Toasimaro Imai was duly sworn to act as interpreter.)

(The questions were asked and the answers given in English unless otherwise noted.)

Direct examination.

By Mr. Sprague:

(The witness is requested to call for the interpreter if he does not understand a question or does not know how to properly answer a question.)

Q. Mr. Kitamura, where do you reside?

A. Kobe.

Q. Japan?

A. Japan.

[fol. 618] Q. Are you employed by Kawasaki Kisen Kabushiki Kaisha, one of the petitioners?

A. Yes.

Q. How long have you been employed by Kawasaki Kisen Kabushiki Kaisha?

A. I have been employed since 1921 by Kawasaki Kisen Kabushiki Kaisha.

Q. You were first employed in 1921 as a clerk in the London office, were you?

A. Yes.

Q. And then in 1922 you were on leave of absence?

A. Yes, I had one year's absence in 1922.

Q. From 1923 to 1925 you were a clerk in the New York office?

A. Yes.

Q. From 1925 to 1930 you were in the Australian office at Sydney?

A. Yes.

Q. And from 1930 to 1932 you were in the Shanghai office of your company?

A. Yes.

Q. From 1932 to May, 1938, what was your position with the petitioner, Kawasaki Kisen Kabushiki Kaisha?

A. I was chief clerk of the foreign traffic department of Kawasaki Kisen Kabushiki Kaisha, Inc.

Q. What have you got there?

A. I have got notes.

Q. In your own handwriting?

A. Yes.

Q. As chief clerk of the foreign traffic department of Kawasaki Kisen Kabushiki Kaisha, what were your duties?

A. My duty as chief clerk was negotiating with shippers and soliciting freight, booking cargo or communicating with foreign agents in foreign countries, laying out new plans for new services or in connection with our ships carrying cargo to and from foreign countries.

Q. Did you have anything to do with the ships of your country that were engaged in the coastal service of Japan?

A. Oh, yes.

Q. Who was the general manager of your company?

A. At that time?

Q. Yes.

A. Mr. Okubo.

Q. And was he an officer of the company?

A. Yes.

Q. Who was the president of your company?

A. Mr. Hirao.

[fol. 619] Q. Were there any other officers of the company besides Mr. Okubo and Mr. Hirao?

A. No.

Q. Who were the other directors of the company besides Mr. Hirao and Mr. Okubo?

A. Mr. Itani, Mr. Kawasaki and Mr. Matsumura.

Q. Were they actively engaged in the business or not?

A. No.

Q. Were they managing directors?

A. The only managing director was Mr. Okubo.

Q. So, these gentlemen, Mr. Kawasaki, Mr. Itani and Mr. Matsumura were not managing directors?

A. No.

By the Court:

Q. Were they active in business?

A. No, only ordinary directors.

Q. Did they have anything to do with the business?
 A. No, they have nothing to do.

, By Mr. Sprague:

Q. I show you Petitioners' Exhibit 16 and ask you if you have examined it and if you can state what it is (handing to witness)?

A. This is a copy of a contract.

Q. Of what contract?

A. The bare boat charter contract.

Q. Covering some ten different ships?

A. Yes, sir, covering the "Florida Maru," the "Belfast Maru," the "Wales Maru," the "Montreal Maru," the "Norfolk Maru," the "Venice Maru," the "Bordeaux Maru," the "India Maru," the "Oregon Maru," the "Thames Maru" and the "Shofuku Maru."

Q. And did that include the "Venice Maru"?

A. Yes, that included the "Venice Maru."

Q. Have you compared that with the original charter party and is this a true copy of the original?

A. Yes, I remember this copy of the original.

[fol. 620-632] Q. Was or was not Kawasaki Kisen Kabushiki Kaisha operating the "Venice Maru" under this charter party, Petitioner's Exhibit 16, in July, August and September, 1934?

A. Yes, it was.

The Court:

Q. Change the question. Is the Exhibit 17 that you have in your hand a correct translation of Petitioner's Exhibit 16?

A. I think so.

Q. Do you know Kabushiki Kaisha Kawasaki Zosenjo?

A. Yes.

Q. Who are named in this document of charter party, Petitioner's Exhibit 17?

A. I know.

Q. Is that the same company as the petitioner Kawasaki Kisen Kabushiki Kaisha?

A. A different company.

Q. Mr. Kitamura, who furnished the officers and crew and appointed the officers and crew of the "Venice Maru" in July, August and September, 1934?

A. Kawasaki Kisen Kaisha.

Q. That is the company by which you are employed?

A. Yes.

Q. Who paid all the expenses of the navigation of the ship during that time?

A. Kawasaki Kisen Kaisha.

Q. Who paid for the victualing of the crew at the time of this voyage in question?

A. Kawasaki Kisen Kaisha.

Q. When did your company open its New York service?

A. 1932.

Q. Was fish meal being offered in Japan for transportation to New York at the time you first opened the New York service?

A. No.

Q. When did you first receive fish meal in Japan for shipment to New York?

A. It was spring in 1933.

Q. Before the spring of 1933 had your company carried fish meal in any other service?

A. Yes.

(Here follows 1 photolithograph, side folio 632a-1926)

U. S. Dist. Court, PATRIOTIC SOCIETY

S. D. of N. Y.

JUL 6 1938 "K"



LINE

No.

KAWASAKI KISEN KAISHA

TRANS-PACIFIC SERVICE

THROUGH BILL OF LADING

TO BE TRANSHIPPED

A1

By Overland / By Water via Panama

Despatched for shipment, in apparent good order and condition from ~~New York~~ New Haven, mentioned, on board the vessel
under Japanese flag, belonging to, or employed by, THE KAWASAKI KISEN KAISHA (hereinafter
called Carriers), commanded by T. INOUYE, for the present voyage or whenever else may be placed in command, the
goods or packages of merchandise marked, numbered and described as per margin, (value, quantity, weight, measurement, grade, quality, contents, and
condition of contents addressed), to be conveyed, with such reasonable despatch as the general manager of the carriers permit, from port of loading
hereinafter mentioned unto port of discharge below named, or so near thereto as safe navigation of such vessel shall then permit, always after
and upon arrival at such port of discharge, to be delivered, in like good order and condition, unto party or parties named as Consignee in the margin,
of this Bill of Lading, or his or their assigns, where and where the vessel's and the carriers' liabilities shall cease, always under and subject to the
exceptions and conditions expressed in this Bill of Lading.

Shippers

Kohei

New York

Port of Loading

Destination

Port of Transhipment

Odessa

Consignee, ~~Odessa~~ - Japanese Sardine Co., Ltd., New York

Notify

(Order Bill of Lading must show party to be notified, otherwise Carriers not responsible for delay and expense when effecting delivery)

MARKS AND NUMBERS	PACKAGES	DECLARED CONTENTS	GROSS WEIGHT	CUBIC FEET
C100	100	100 Bgs. Japanese Sardine meal 200000lb.		
New York 100 Lbs net made in Japan				
TOTAL	100		200000lb	

MARKS AND NUMBERS	PACKAGES	DECLARED CONTENTS	GROSS WEIGHT	CUBIC FEET
CICO	100	87. Japanese sardine meal	200000lb	
New York 100 Lbs net made in Japan	2000		200000lb	

ATTENTION OF SHIPPERS is particularly called to the fact that Goods of an inflammable or explosive or corrosive or otherwise dangerous or injurious nature shall be distinctly so marked, as to indicate their character before shipment, and be transported, if the carriers choose, on deck or elsewhere, and they shall in all cases be at the shipper's or cargo owner's risk. If any such articles shall be delivered to the carriers without stating the character thereof and having the same distinctly and legibly marked upon the package or case containing the same, the shippers shall be responsible for any damage to other cargo, the ship and/or others, whatsoever caused by such goods, and such goods may be seized and confiscated or destroyed by the carriers, if deemed necessary, without incurring any liability whatever. All time, expenses, losses or damage which the carriers or their agents or servants, or the ship or cargo or others, whatsoever may incur or suffer on account of incorrect or insufficient marking of the packages, or disappearance of their contents, or other failure to comply with customs regulations or by reason of the inflammable, explosive, corrosive, or otherwise dangerous or injurious nature of such contents, shall be borne by and be recoverable severally and jointly from the owner, shipper, or consignee, whether such owner, shipper or consignee shall be aware thereof or not.

It is mutually agreed that steamer *Ningpo* is subject to the regular charges at port of destination for wharfage, demurrage, etc., and it is further agreed that the goods must be removed from the wharf within three days after discharge, otherwise same will be placed in store at the risk and expense of consignee and/or owners of goods.

IN WITNESS WHEREOF, the owners or Agents of the said ~~Indians~~ have signed
and accomplished the above to stand valid. Dated at:

ILLS OF JAHIN.

CLIPPER NUT NEUTRIALIFE

(Subject to conditions and
exceptions as per above)

1

9.—In addition to the basic liability provided, the Carrier shall have a lien on the goods for all expenses from liability and damages which the Carrier, vessel, or cargo may suffer through any illegal or improper act of shippers, consignees or owners of goods as well as for all other costs due from goods, freight, charter, owner or carrier of Goods to the Carrier. All liens to which the Carrier is entitled by law, or under this bill of lading, shall be enforced directly by the Carrier, and not through shippers, owners or carriers, conditions, or otherwise.

— If the goods be presented by Quay Master from time to time, or at the demand of the receiver of the goods, or in default of payment, the parties shall forthwith, or as soon thereafter notice to shipper, owner or consignee, the parties shall forthwith, or as soon thereafter notice to shipper, owner or consignee, the parties shall forthwith, or as soon thereafter notice to shipper, owner or consignee, the parties shall forthwith, or as soon thereafter notice to shipper, owner or consignee, all and every of them, and such discharge shall be deemed a full and final delivery of the goods, at risk, responsibility and expense of the Carrier, whether in carrier, bailee or otherwise, whether as soon as the goods are delivered from the ship's hold, and all expenses thereby or thereon incurred, and all expenses of such delivery shall be paid by shipper, owner and consignee, all and every of them, the Carrier reserving a lien on the goods therefor; but should the vessel or goods not be delivered, or such delivery be impracticable, or as on the arrival of the vessel, the Carrier may forthwith, without previous notice, proceed to sell the goods, part, or at their option, to the highest bidder, to whom the ship is then entitled, or the rights and interest of the original owner or consignee, all and every of them, and such bid shall be made at the expense of the original owner or consignee, at the risk and expense of shipper, owner and consignee, all and every of them, so that the original owner or consignee, and the Carrier, retaining a lien on the goods whether and for as long a period and expense incurred, and for all subsequent cost of delivery. Collectors of Customs are hereby authorized to grant a general order of discharge immediately the cargo be cleared or custom house.

6.—In case of war, banditry, revolution, insurrection, rebellion, or armed opposition or demonstration, whether at or near the port of discharge, or elsewhere in the course of the voyage, or of loss or damage by fire or of the happening of any other cause or event, whether of the shipper or consignee to those above mentioned or otherwise, and whether owned or chartered before or after arrival, or during or otherwise, and whether owned or chartered by Consignee or Agent, or by Master, no event in damage or loss of the vessel or cargo shall give rise to risk of capture, seizure or detention of vessel or cargo, except in case of war or rebellion, or in which lies in his or their judgment may think it unsafe or imprudent for any reason to proceed on or continue the voyage, or enter or discharge cargo at the port of discharge, or which in his or their judgment is likely to give rise to delay or difficulty in reaching, discharging or leaving the port of discharge, the Master shall be at liberty, in his judgment, to proceed or return to the port of origin and discharge the cargo, or any part thereof, at such other port of passage as the Master may determine, and the shipper, master, charterer, and owners and consignees or lessors of the cargo shall be on the risks and expenses of the shipper and owners, consignee and holder of the bill of lading, of the vessel.

7.—Agents and Master shall be freed and discharged from any responsibility whatsoever, as respects thereto.

10.—The vessel may commence discharging immediately on delivery and discharge continuously without regard to weather; any portion of the port to the contrary notwithstanding; carrier is not and shall not be required to deliver said merchandise at port of discharge at any particular time or to meet any particular shipper or in time for any particular use; and shipper shall notify consignee or other person of forwarder or carrier

RAILWAY CLAIMS

19.—The carrier has the obligation to carry general cargo including barreling or bagged products of petroleum, spirits of camphor, oil kinds of chemical products and liquids in barrels, barrels of gunpowder, and also live stock on land or under deck. Goods carried on deck shall be at the risk of the shipowner, master, and/or charterers thereof. The master or other agents shall not be held liable for any damage to the vessel carrying goods having carriage or coverage risks, or apparently so, or for the value of other cargo of whatever kind on board, unless the carrier has been paid for such carriage or coverage.

— Fig. 10. Drawing of the posterior margin and glans, showing the cavity or depression produced by absence of epiphysis, or absence of any portion of the corpus cavernosum, and the consequent curvature of the penile shaft.

11.—If any damaged or broken goods are loaded stock or car, the receiver and/or consignee shall accept such notwithstanding the responsibility as may be claimed by the shipper. Goods and boxes shall be examined and certified of any damage for loss or damage, and responsible for breakage weight in bags, or broken, worn, cracked, or otherwise.

22.—No claim shall under any circumstances whatever, attach to the Carrier for failure to notify consignee or others concerned of the arrival of the Goods.

same host or non host, or if there be a formal agreement or shared ownership of the vessel by a group of owners or shareholders, or if the vessel is part of a fleet, the responsibility for the carriage of dangerous goods shall rest with the master of the vessel, and the chief engineer shall be responsible for the safety of the vessel, and the usual officers shall be responsible for the conduct of the vessel.

30.—The amendment for the amendment made under this bill of listing, whenever made, to be submitted and presented by Congress Law, and further is subject to all the provisions of Sections 401, 402, and 403 of the Revised Statutes, of the Act of Congress of the United States, approved on February 15, 1863, and entitled "An Act Relating to Navigation of Vessels," and of Section 202 of the French Merchant Shipping Act.

described shall be liable for any loss thereof, or damage thereto, or delay caused by the steamer or owner, or for difference in the weight of grain, meal, or other commodity or of negligence of the said carrier in proportion and the number as per ton fraction from and not be liable for loss, damage, liability otherwise, while the grain being described herein such removal, or delivery therefrom, either in view to the property, or from the rats, of

19.—**11 months.**—In case of a voyage from or to another port, and in case of a voyage of 11 months or more, it is agreed that the parties shall make those arrangements with each other as to this section, and subject also to the condition that no part of the lake, sea, or other waters, or from explosion, bursting of boilers, breakage of machinery, or other accidents of navigation, or from presumption of the voyage. And any such interruptions past to now and to be served, next vessels in distress and deviate for the same or intended to go to the harbour or to the river or in lakes or other harbours and for the property or persons by the party named to be required it within forty-eight hours (exclusive), deposit or present at the port of arrival, the amount equivalent to a sum of money equal to the amount of the passage, and to furnish a written guarantee for the payment of the same, and to leave for all costs, charges, and other lawful expenses incident to a reasonable compensation for the use of such other ship, boat, or vessel held, kept, used, or hired. (Article 11 of

car, or not, the law of this state that the car had been away eight hours (inclusive or exclusive) and hold such property subject to a lien therefore. Nothing in the same affecting car service or charge. H—Railway transit subject to laws of the United States.

[fol. 1927] PETITIONERS' EXHIBIT 17

Translation of charter party covering S. S. "Venice Maru" as made by Mt. Fujino.

Bare Boat Charter Party

of FLORIDA MARU and ten other Steamers

On the first day of June, the 8th year of Showa (1933) bare boat charter was signed between Kabushiki Kaisha Kawasaki Zosenjo the owners of Japanese boat Florida Maru and ten other steamers, (hereafter simply called the owners) and the charterers Kawasaki Kisen Kabushiki Kaisha (hereafter simply called the Charterers) under the following terms and conditions:

Article No. one. The owners deliver to the charterers Florida Maru and the following ten other steamers at twelve A. M. on the first day of June, the 8th year of Showa, irrespective of their positions whether in voyage or in ports, in their respective actual state, equipment and conditions and leave them under the charterers operation and employment until the cancellation of the charter party is effective, after due advance notice of six months for cancellation was given by either party and mutual negotiation was made there upon:

The following boats:

Names	Gross tons	Dead weight tons
Florida Maru	5845.47	9114.3
Belfast Maru	6586.40	9923.2
Wales Maru	6586.40	9750.0
Montreal Maru	6576.52	9946.4
Norfolk Maru	6576.17	9728.8
Venice Maru	6571.25	9727.8
Bordeaux Maru	6566.53	9810.8
India Mara	5872.89	9074.9
Oregon Maru	5872.89	9037.6
Thames Maru	5871.00	9084.0
Shofuku Maru	1771.64	2597.7

[fol. 1928] Article No. two. The charterers, at their own risk and expense carry all the business of these steamers' operations, such as appointments, dismissals of officers and

crew also direction and supervision of operations and pairings of steamers, provision of stores and supply of all consumption materials or any other matter connected with operation of transportation.

Article No. three. The charterage to be negotiated and settled between the owners and the charterers every half yearly.

From twelve A. M. on the first day of June, the 8th year of Showa for the half year, that is until the end of November the 8th year of Showa, the charterage for Florida Maru and nine other steamers, excluding S. S. Shofuku Maru against total dead weight tons of 95197.8 to be at the rate of fifty five sen per dead weight ton, per calendar month.

For Shōfuku Maru D.W.T. 2597.1 charterage to be at the rate of thirty sen, on the same basis as afore mentioned.

Thereafter, the charterage to be settled for the succeeding half year, one month before the expiration, after considering situation of the shipping market and after frank, earnest negotiating endeavored between the owners and the charterers. The charterage for less than one month to be charged for number of days by per day basis and by hours for less than one day.

Article No. four. From the time of commencement to the time of expiration of this charter party the charterers to pay the owners the charterage specified in Article No. three, each month, in cash, divided into two, on the first and sixteenth of each corresponding month covering each half month.

Article No. five. The charterers to take over the present insurance policies as they are, with clauses covering [fols. 1929-1970] salvage expenses against total loss for ship's hull, machinaries, boilers and accessory equipments and for part damages caused by general average and stranding, aground, fire, collision damage, sinking also 4/4 insurance policies with compensation clause against collision damages. But after expiration of these policies the insurance amount to be settled after the negotiation between the owners and the charterers. The compensation from the above mentioned policies belong to the charterers except in the case of total loss.

To certify this charter party, two original documents were made and each party holds one document with mutual signatures and seals affixed.

The first day of June, the 8th year of Showa for the owners, Yoshikuma, Kawasaki, Managing Director; Kabushiki-Kaisha Kawasaki-Zosenjo, No. 14-2-Chome, Higashi Kawasaki Machi, Koto-Ku, Kōbe City. (Seal)

For the charterers: Hachisaburo, Hirawo, Managing Director and President, Kawasaki Kisen Kabushiki Kaisha, No. 8 Kaigan Tori, Kōbe-Ku, Kōbe City. (Seal)

[fol. 1971] IN UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK

Messrs. Crawford & Sprague, by George C. Sprague, Esq., and Roy Chamberlain, Esq., for Petitioners.

Messrs. Hill, Rivkins & Middleton, by Thomas H. Middleton, Esq., and Eugène P. McCue, Esq., for various Cargo Claimants.

Messrs. Hatch & Wolfe, by Carver W. Wolfe, Esq., and Roif T. Michelsen, Esq., for Seaman Brothers, Inc.

Messrs. Bigham, Englar, Jones & Houston, by T. Catesby Jones, Esq., and Ezra G. Benedict Fox, Esq., for various Cargo Claimants.

OPINION OF BONDY, D. J.

BONDY, District Judge:

The petitioners Kabushiki Kaisha Kawasaki Zosenjo, owner and Kawasaki Kisen Kabushiki Kaisha, hereinafter referred to as the K Line, bareboat charterer of the steamship "Venice Maru," seek exoneration from or limitation of liability for cargo loss and damage arising out of a fire aboard the "Venice Maru."

July 5th, 1934, the "Venice Maru" with some general cargo aboard arrived at Kobe where the main offices of the petitioners were located. At Kobe more general cargo and

1900 tons of sardine meal in 38,000 bags were taken aboard, to be carried to Atlantic Coast ports in the United States via Panama Canal. Of the 38,000 bags, 13,312 were stowed in No. 1 lower hold, 11,884 in No. 3 lower hold, 6,735 in No. 6 lower hold and 6,069 in No. 3 tweendeck.

[fol. 1972] 1087 cases of porcelain goods were thereafter loaded on the weatherdeck at Nagoya and about 595 additional cases of porcelain goods were transferred from the ship's hold to the weatherdeck at Yokohama, from which the "Venice Maru" sailed July 13th, with all holds full and with 1682 cases on the weatherdeck covering most of the free deck space and the after two-thirds of No. 1 weather deck hatch. After encountering heavy rains which prevented as much ventilation as was anticipated to under-deck cargo, the "Venice Maru" arrived at Los Angeles July 29th, where 91 tons of cargo were discharged.

The "Venice Maru" left Los Angeles July 30th for Balboa with her weatherdeck and the after two-thirds of No. 1 weatherdeck hatch still covered by cargo. She encountered fine but hot weather.

Early in the morning of August 6th, smoke was observed coming out of the ventilators leading into No. 1 lower hold. Some of the bags of sardine meal stowed therein were found to be heating and giving off smoke. Notwithstanding efforts to control the situation the fire broke out, resulting in damage to and destruction of cargo by fire and water used to extinguish it.

The petitioners contend that the fire was caused solely by the inherent nature of the meal which rendered it unfit for transportation to the United States. The claimants contend that the fire was caused by negligent stowage of meal in too large a quantity in No. 1 lower hold without adequate means of ventilation for the long voyage from Kobe via Panama to New York and other Atlantic Coast ports of the United States.

The record discloses that the meal shipped in the "Venice Maru" consisted of Japanese sardine meal manufactured in Japan in the usual manner and that it was merchantable and fit for transportation by sea from Kobe to New York if properly stowed and ventilated. All analyses excepting only the analysis made by one of the shipper's competitors [fol. 1973] disclose that the moisture content of samples of the meal varied between 7.87% and 9.28%, and the oil con-

tent between 6.84% and 8.54%, well within the range of high grade Japanese sardine meal.

The meal was packed, as was usually done, in second-hand bags. Even assuming there was grain dust on some of the bags, the risk of spontaneous combustion was not thereby increased.

No. 1 lower hold, in which 13,312 bags were stowed, was a large cargo compartment, about 60 feet long, about 46 feet wide and from 20 to 23½ feet deep, with a tweendeck compartment 9½ feet deep and a shelterdeck compartment 8 feet deep above it. The meal was stowed in a substantially solid mass and occupied substantially the entire hold except a foot or two along the bulkheads and sides, and between the top of the cargo and overhead deck beams and a channel about one foot wide running athwartships through the middle of the stow. Five rows of rice ventilators extended fore and aft in the 5th, 10th, and 16th tiers of bags and six rows of such ventilators extended athwartships in the 6th, 11 and 17th tiers of the stow. These were connected with vertical rice ventilators placed at the four corners of the hatchway.

The permanent ventilating system of the "Venice Maru" was sufficient for the carriage of general cargo. Sardine meal, however, has been recognized as an hazardous cargo subject to heating and to spontaneous combustion. Properly stowed in small lots adequately ventilated it had been frequently carried safely by sea from Japan to the United States in tweendecks and in holds, notwithstanding its well known propensity to spontaneous combustion. Only a small quantity of the meal so shipped to the United States was better in quality than that shipped on the "Venice Maru." The variations that must have existed in the moisture and fat contents of the meal in the bags did not interfere with its safe transportation.

[fol. 1974] The K Line before the shipment in question had experience in the carriage of Japanese sardine meal from Japan to the Pacific Coast of the United States and to a lesser extent to the Atlantic Coast ports of the United States. It however experienced trouble from overheating of sardine meal on five of its vessels commencing with the voyage of the "Montreal Maru" sailing from Yokohama, September, 1933. In each case the overheating occurred after the vessels had left Los Angeles on their way to the Atlantic Coast.

notwithstanding that rice ventilators had been used on two of these ships, the "Nichiyo Maru," and the "Tohsei Maru," both of which arrived in New York in May, 1934 before the "Venice Maru" had sailed from Japan.

The effect of the use of rice ventilators placed throughout the stow was unknown, uncertain and speculative. It may be of interest to note that some of the meal which was discharged at Balboa for ventilation was restowed on the "Venice Maru," and divided into small lots with channels between them in accordance with the block and channel method which came into general use in 1935, when it was realized that the experiments with rice ventilators proved unsatisfactory.

The evidence does not establish any custom or usage in the carriage of fish meal from Japan to Atlantic Coast ports which justified the stowing of 665.6 tons of fish meal, with or without rice ventilators, in a substantially solid mass so as almost to fill a lower hold.

I believe that the stowage of 665.6 tons of sardine meal in a substantially solid mass in the lower hold for the long voyage from Kobe to Atlantic Coast ports via the Panama Canal, constituted negligence and was a proximate cause of the fire in that even assuming that the rice ventilators were used in the manner claimed by the K Line, insufficient ventilation was provided. See *The Nichiyo Maru*, 14 Fed. Supp. 727, affirmed 89 Fed. (2d) 529; Cf. *The Willfaro*, 9 Fed. (2d) 940, affirmed 9 Fed. (2d) 662; and see *The Ferncliff*, 1975] *cliff*, 22 Fed. Supp. 728, in which a better system of rice ventilators apparently was resorted to.

The nature of sardine meal and the necessity of exposing a sufficiently large part thereof to circulating air have been so thoroughly considered by Judge Chestnut in the *Nichiyo Maru*, *supra*, and the *Ferncliff*, *supra*, that further reference thereto would not serve any useful purpose.

The K Line contends that it is exonerated from all liability because the loss and damage resulted from the fire not caused by its design or neglect. See Fire Statute, 46 U. S. C. A. 182.

The duty to stow cargo properly is considered delegable in determining whether there was design or neglect of the ship owner personally within the provisions of the Fire Statute. See *Earle & Stoddart v. Wilson Line*, 287 U. S. 420, 427. There was not any negligence in the delegation of the duty to plan and supervise the stowage of the

meal to Captain Fegen, an experienced, Lloyd's Agent marine surveyor, well qualified to perform the service. Cf. *Flat-Top Fuel Company v. Martin*, 85 Fed. (2nd) 39, 42. His authority, however, was limited to supervision of meal stowage for the K Line at Kobe and to the giving of instructions to the masters with reference to such stowage. He was not a marine superintendent, general agent or managing officer of the K Line. He was simply an independent surveyor without power to control the movement, or crew of the ship, or to bind the K Line by contract. The negligent stowage of Captain Fegen was not, therefore, neglect of the owner personally, and does not deprive the K Line of its right to exoneration under the Fire Statute.

Prior to the loading of the "Venice Maru" the K Line had carried large quantities of meal on many occasions, but the record does not disclose what, if any, part was stowed in the lower holds on most of these voyages. It, however, is clear that meal was carried in the lower holds [fol. 1976] on at least three previous voyages, on the "Nichiyo Maru," "Tohsei Maru," and "Soyo Maru"; that there was overheating on these voyages and that on two of these, the "Tohsei Maru" and "Nichiyo Maru," rice ventilators were used. Mr. Okubo, who was the Acting President and General Manager of the K Line, testified that he did not inform Captain Fegen or instruct anyone else to inform Captain Fegen of the experiences of the K Line, even though Mr. Okubo knew fish-meal constituted a considerable portion of the cargo of the "Venice Maru," and that some part of the large shipment of meal might be stowed in a lower hold.

A ship owner has been held to be under a duty to give information to those who have to operate or repair his ship. See *The W. D. Anderson*, 17 Fed. Supp. 754, affirmed 94 Fed. (2nd) 377, certiorari denied, 303 U. S. 658; *The Vestris*, 60 Fed. (2nd) 273, 286; *The Schwan*, 1909 A. C. 450, 454; *Standard Oil Co. v. Clan Line Steamers, Ltd.*, 1924 A. C. 100, 110, 114, 123, 124, 126, *et seq.*, and it is conceivable that a like duty may in certain circumstances be imposed upon an owner regarding stowage. But in each of the cases above cited, the courts held it was unreasonable for the owner to expect anyone else to possess knowledge of an existing peculiarity of the particular ship of which information was withheld.

The K Line was justified in relying upon the expert knowledge of Captain Fegen, a capable and experienced surveyor, as to what was the proper method of stowing and ventilating the meal. There was not any proof that Captain Fegen did not know or was unable to find out about heating of fish meal during its transportation to United States Atlantic ports.

That there had been overheating, even when rice ventilators were resorted to, was knowledge that experts on stowage could reasonably have been expected to have had at the time. There was not any reason why the K Line [fol. 1977] should have suspected that Captain Fegen did not have this information. I find, therefore, that Mr. Okubo was not negligent in failing to inform Captain Fegen about the experiences of the K Line. It also follows that he was not required to issue special instructions as to stowage to officers of the "Venice Maru" since Captain Fegen, who was well qualified, was employed to do so.

Mr. Okubo did not know that cargo was stowed on the weatherdeck until after the "Venice Maru" had sailed from Japan, or that any part of the cargo placed on the deck had been stowed on hatch covers until after the voyage had ended. He was not an expert; he did not know the details of the stowage, or that the deck cargo would have any effect upon the ventilation of No. 1 lower hold. He accordingly was not negligent in failing to make arrangements to have the cargo shipped under deck after the "Venice Maru" reached Los Angeles or in failing to consult Captain Fegen concerning the deck cargo. Nor is it probable that any change would have been made had he consulted Captain Fegen, upon whose judgment he relied, for the latter stated he believed it was unnecessary to uncover more than one-third of the hatch.

The stowage on deck of cargo shipped under clean bills of lading constituted a deviation but such deviation does not deprive the ship owner of his right to exoneration under the Fire Statute, unless it was a cause of the fire. *The Ida*, 75 Fed. (2nd) 278, 279; *Globe & Rutgers Fire Insurance Co. v. United States*, 105 Fed. (2nd) 160, 166, and not even then, unless the deviation was the result of the neglect or design of the owner personally. See *The Ida*, *supra*. Though the stowage on the hatch may have interfered in some measure with the ventilation of the cargo under deck

and may have hindered efforts to prevent the outbreak of the fire, the claimants have failed to establish that stowage on the hatch covers was the result of the design or neglect on the part of the K Line.

[fol. 1978] The K Line therefore is entitled to exoneration of liability under the Fire Statute.

The record does not disclose any negligence on the part of Kabushiki Kaisha Kawasaki Zosenjo or of any persons for whose acts it is responsible. Not having had anything whatsoever to do with the stowage or operation or control of the ship, it also is exonerated from liability under the Fire Statute, assuming there otherwise were liability.

The K Line refuses to return to claimants general average deposits exacted by it before delivering the cargo to them, contending that the deposits were properly exacted.

An owner who is exonerated from liability by the Fire Statute does not thereby become entitled to general average contribution. His right to contribution must rest upon an agreement. *Globe & Rutgers Fire Ins. Co. v. United States*, 105 Fed. (2nd) 160, 164.

The bills of lading contain a Jason Clause, which provides that "if the shipowner shall have exercised due diligence to make the vessel in all respects seaworthy," in case of damage resulting from unseaworthiness, the cargo owners shall contribute with the ship owner in general average. The Harter Act, 46 U. S. C. A. 192, exempts the ship owner under certain circumstances from liability for damage which otherwise would exist "if the owner of any vessel shall exercise due diligence to make the said vessel in all respects seaworthy."

The Harter Act, Section 3, 46 U. S. C. A. 192, does not apply in case the owner or any of the owner's agents fail to use due diligence to make the vessel seaworthy. See *Earle & Stoddart v. Wilson Line*, 287 U. S. 420, 426. The Jason Clause refers to the due diligence of the owner in words almost identical with those used in Section 3 of the Harter Act. It accordingly may be assumed that the words were used with the same meaning and effect, and that the owner is not entitled to contribution if his agents fail to exercise due diligence.

[fol. 1979] Moreover, 46 U. S. C. A. 191 provides that it shall not be lawful for any owner to insert in any bill of lading any agreement whereby the obligation of the owner to exercise due diligence to make the vessel seaworthy or

to stow her cargo carefully shall in any wise be lessened or avoided. To allow the owner contribution in case of his agent's negligence would violate this provision, since it would lessen his liability in situations in which 46 U. S. C. A. 192 would not relieve him thereof.

The stowage of the meal on the "Venice Maru" was negligent and made the vessel unseaworthy. Since "due diligence" had not been exercised by Captain Fegen, the Jason Clause does not apply and the general average deposits must be returned with interest.

Findings of facts, conclusions of law and a decree in accordance herewith are to be submitted.

March 31st, 1941.

William Bondy, U. S. D. J.

IN UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK

Findings of Fact and Conclusions of Law

FINDINGS OF FACT

(1) Petitioner, Kabushiki Kaisha Kawasaki Zosenjo, a Japanese corporation with its main office at Kobe, Japan, was at all times material hereto owner of the Steamship "Venice Maru." It had nothing whatsoever to do with the stowage or operation or control of the ship.

(2) Petitioner, Kawasaki Kisen Kabushiki Kaisha, hereinafter referred to as the "K" Line, a Japanese corporation with its main office located at Kobe, Japan, was at all times material hereto bareboat charterer of the Steamship "Venice Maru" and operated, manned, victualed and navigated her in the common carriage of goods for hire.

(3) The claimants in this limitation proceedings are either the owners of cargo carried on board the S. S. "Venice Maru" on July 1, 1934, sailing from Japan or are trustees for owners of such cargo. All of the cargo involved had been shipped on board the S. S. "Venice Maru" in apparent good order and condition for carriage pursuant to the terms and conditions of certain negotiable bills of lading duly issued either by the head office of the

petitioner, Kawasaki Kisen Kabushiki Kaisha, or by one of its sub-offices or by its duly authorized agents. Said bills of lading specifically provided, inter alia, that they were subject to the terms and conditions of the Harter Act (46 U. S. Code Sec. 190-195) and also contained a clause reading as follows:

"If the shipowner shall have exercised due diligence to make the vessel in all respects seaworthy, and to have her properly manned, equipped and supplied, in case of danger, damage or disaster, resulting from accident or faults or errors in navigation, or in the management of the vessel, or from any latent or other defect in the vessel, her machinery or appurtenances, or from unseaworthiness, whether existing at the time of shipment or at the beginning of the voyage, if the defect or unseaworthiness was not discoverable by the exercise of due diligence, the shippers, consignees or owners of the cargo nevertheless pay salvage and special charges incurred in respect of the cargo, and shall contribute with the shipowners in general average to the payment of any sacrifices, losses, or expenses of general average nature that may be made or incurred for the common benefit, or to relieve the adventure of any common peril, all with the same force and effect and to same extent as if such accident, danger, damage or disaster had not resulted from, or been occasioned by faults or errors in navigation or in the management of the vessel, or by any latent or other defect or unseaworthiness."

None of the bills of lading covering cargo carried on this voyage of the "Venice Maru" provided for on-deck stowage:

(4) On July 5th, 1934, the "Venice Maru" with some general cargo aboard arrived at Kobe where the main offices of the petitioners were located.

(5) At Kobe more general cargo and 1,900 tons of sardine meal in 38,000 bags were taken aboard to be carried to Atlantic Coast ports in the United States via the Panama Canal. Of the 38,000 bags, 13,312 were stowed in No. 1 lower hold, 11,848 in No. 3 lower hold, 6,735 in No. 6 lower hold and 6,069 in No. 3 tweendeck.

(6) 1,087 cases of porcelain goods were thereafter loaded on the ship's weatherdeck at Nagoya.

(7) About 595 additional cases of porcelain goods were transferred from the ship's hold to the weatherdeck at Yokohama:

(8) The "Venice Maru" sailed from Yokohama July 13th, with all holds full and with 1,682 cases of porcelain goods on the weatherdeck covering most of the free deck space and the after two-thirds of No. 1 weatherdeck hatch.

(9) After encountering heavy rains which prevented as much ventilation as was anticipated to under deck cargo, [fol. 1982] the "Venice Maru" arrived at Los Angeles July 29th, where 91 tons of cargo were discharged.

(10) The "Venice Maru" left Los Angeles July 30th for Balboa with her weatherdeck and the after two-thirds of No. 1 weatherdeck hatch still covered by the aforesaid porcelain goods cargo. She encountered fine but hot weather after leaving Los Angeles.

(11) Early in the morning of August 6th, while the "Venice Maru" was between Los Angeles and Balboa, smoke was observed coming out of the ventilators leading into No. 1 lower hold. Some of the bags of sardine meal stowed therein were found to be heating and giving off smoke. Notwithstanding efforts to control the situation fire broke out, resulting in damage to and destruction of cargo by fire and water used to extinguish it.

(12) In addition to many shipments which became a total loss by reason of the fire on board the "Venice Maru" and the means taken to extinguish it, many other shipments sustained partial damage by the same causes.

(13) On delivery at destination of such cargo as had not been so severely damaged as to necessitate its disposal at Panama, the "K" Line as trustee exacted general average guarantees and, in some instances cash general average deposits as a condition precedent to the delivery of such cargo. Subsequently, a general average adjustment was issued by Messrs. Johnson & Higgins, general average adjustors appointed by the "K" Line as trustee.

(14) The sardine meal shipped in the "Venice Maru" had been manufactured in Japan in the usual manner and

it was merchantable and fit for transportation by sea from Kobe to New York if properly stowed and ventilated.

[fol. 1983] (15) All analyses of the sardine meal shipped on the vessel, excepting only the analysis made by one of the shipper's competitors, disclose that the moisture content of samples of the meal varied between 7.87% and 9.28%, and the oil content between 6.84% and 8.54%, well within the range of high grade Japanese sardine meal.

(16) The sardine meal was packed, as was usually done, in second-hand bags. Even assuming there was grain dust on some of the bags, the risk of spontaneous combustion was not thereby increased.

(17) No. 1 lower hold, in which 13,312 bags of sardine meal were stowed, was a large cargo compartment, about 60 feet long, about 46 feet wide and from 20 to 23½ feet deep, with a tweendeck compartment 9½ feet deep and a shelterdeck compartment 8 feet deep above it.

(18) The sardine meal was stowed in a substantially solid mass and occupied substantially the entire No. 1 lower hold, except a foot or two along the bulkheads and sides, and between the top of the cargo and overhead deck beams and a channel about one foot wide running athwartships through the middle of the stow. Five rows of rice ventilators extended fore and aft in the 5th, 10th and 16th tiers of bags and six rows of such ventilators extended athwartships in the 6th, 11th and 17th tiers of the stow. These were connected with vertical rice ventilators placed at the four corners of the hatchway.

(19) The permanent ventilating system of the "Venice Maru" was sufficient for the carriage of general cargo.

(20) Sardine meal has been recognized as an hazardous cargo, subject to heating and to spontaneous combustion. Properly stowed in small lots adequately ventilated it had been frequently carried safely by sea from Japan to the [fol. 1984] United States in tweendecks and in holds, notwithstanding its well known propensity to spontaneous combustion. Only a small quantity of the meal so shipped to the United States was better in quality than that shipped on the "Venice Maru."

(21) The variations that must have existed in the moisture and fat contents of the sardine meal in the bags did not interfere with its safe transportation.

(22) The "K" Line, before the shipment in question, had experience in the carriage of Japanese sardine meal from Japan to the Pacific Coast of the United States and to a lesser extent to the Atlantic Coast ports of the United States. It, however, experienced trouble from overheating of sardine meal on five of its vessels commencing with the voyage of the "Montreal Maru" sailing from Yokohania, September, 1933. In each case the overheating occurred after the vessels had left Los Angeles on their way to the Atlantic Coast, notwithstanding that rice ventilators had been used on two of these ships, the "Nichijo Maru" and the "Tohsei Maru," both of which arrived in New York in May 1934, before the "Venice Maru" had sailed from Japan.

(23) The effect of the use of rice ventilators placed throughout the stow was unknown, uncertain and speculative.

(24) Some of the sardine meal which was discharged at Balboa for ventilation was restowed on the "Venice Maru" and divided into small lots with channels between them in accordance with the block and channel method which came into general use in 1935, when it was realized that the experiments with rice ventilators proved unsatisfactory.

(25) The evidence does not establish any custom or usage in the carriage of fish meal from Japan to Atlantic [fol. 1985] Coast ports which justified the stowing of 665.6 tons of fish meal, with or without rice ventilators, in a substantially solid mass so as almost to fill a lower hold.

(26) The nature of sardine meal necessitates exposing a sufficiently large part thereof to circulating air.

(27) The stowage of 665.6 tons of sardine meal in a substantially solid mass in No. 1 lower hold for the long voyage from Kobe to Atlantic Coast ports via the Panama Canal, constituted negligence.

(28) The stowage of the 665.6 tons of sardine meal in No. 1 lower hold, as described in findings (18) and (27), was a proximate cause of the fire in that, even assuming that

rice ventilators were used in the manner claimed by the "K" Line, insufficient ventilation was provided.

(29) The "K" Line had no marine superintendent connected with its head office at Kobe. Captain Fegen was the sole person from shore at Kobe charged with the duty by "K" Line of seeing to safe stowage of sardine meal on the "Venice Maru."

(30) Captain Fegen laid out and personally supervised the stowage on the "Venice Maru" of the 38,000 bags or 1,900 short tons of sardine meal which the head office of "K" Line had booked for carriage on that vessel.

(31) There was not any negligence in the delegation by "K" Line of the duty to plan and supervise the stowage of the sardine meal to Captain Fegen, an experienced Lloyd's Agent marine surveyor, well qualified to perform the service.

(32) Captain Fegen's authority was limited to supervision of sardine meal stowage for the "K" Line at Kobe [fol. 1986] and to the giving of instructions to the masters with reference to such stowage.

(33) Captain Fegen was not a marine superintendent, general agent or managing officer of the "K" Line. He was simply an independent surveyor without power to control the movement, or crew of the ship, or to bind the "K" Line by contract.

(34) Prior to the loading of the "Venice Maru" the "K" Line had carried large quantities of sardine meal on many occasions but the record does not disclose what, if any, part was stowed in the lower holds on most of these voyages. It, however, is clear that sardine meal was carried in the lower holds on at least three previous voyages, on the "Nichiyo Maru," "Tohsei Maru," and "Soyo Maru"; that there was overheating on these voyages and that, on two of these, the "Tohsei Maru" and "Nichiyo Maru," rice ventilators were used.

(35) Mr. Okubo was the Acting President and General Manager of the "K" Line and its only officer actively participating in its business affairs and the operations of its vessels.

(36) Mr. Okubo knew that "K" Line had contracted to carry general cargo on the "Venice Maru" on the voyage in question in addition to the sardine meal.

(37) Mr. Okubo did not inform Captain Fegen or instruct any one else to inform Captain Fegen of the experiences of the "K" Line, even though Mr. Okubo knew sardine meal constituted a considerable portion of the cargo of the "Venice Maru," and that some part of the large shipment of such meal might be stowed in a lower hold.

[fol. 1987] (38) The "K" Line was justified in relying upon the expert knowledge of Captain Fegen, a capable and experienced surveyor, as to what was the proper method of stowing and ventilating the sardine meal.

(39) There was not any proof that Captain Fegen did not know or was unable to find out about heating of sardine meal during its transportation to United States Atlantic ports.

(40) The fact that there had been overheating of sardine meal, even when rice ventilators were resorted to, was knowledge that experts on stowage could reasonably have been expected to have had at the time. There was not any reason why the "K" Line should have suspected that Captain Fegen did not have this information.

(41) Mr. Okubo was not negligent in failing to inform Captain Fegen about the experiences of the "K" Line.

(42) Mr. Okubo was not required to issue special instructions as to stowage to officers of the "Venice Maru" since Captain Fegen, who was well qualified, was employed to do so.

(43) Mr. Okubo did not know that cargo was stowed on the weatherdeck until after the "Venice Maru" had sailed from Japan, or that any part of the cargo placed on the deck had been stowed on hatch covers until after the voyage had ended.

(44) Mr. Okubo was not an expert; he did not know the details of the stowage, or that the deck cargo would have any effect upon the ventilation of No. 1 lower hold and accordingly was not negligent in failing to make arrangements to have such cargo shipped under deck after the

"Venice Maru" reached Los Angeles or in failing to consult Captain Fegen concerning the deck cargo.

[fol. 1988] (45) It is not probable that any change would have been made after the vessel reached Los Angeles had Mr. Okubo consulted Captain Fegen, upon whose judgment he relied for the latter stated he believed it was unnecessary to uncover more than one-third of the hatch.

(46) Though the stowage on the hatch may have interfered in some measure with the ventilation of the cargo under deck and may have hindered efforts to prevent the outbreak of the fire, claimants have failed to establish that such stowage was the result of the design or neglect of the "K" Line.

(47) The record does not disclose any negligence on the part of Kabushiki Kaisha Kawasaki Zoséno or of any persons for whose acts it is responsible.

(48) The "K" Line refuses to return to cargo claimants general average deposits exacted by it from certain of them before delivering the cargo to them, contending that the deposits were properly exacted.

(49) The stowage of the sardine meal on the "Venice Maru" was negligent and made the vessel unseaworthy.

(50) "Due diligence" to make the vessel seaworthy was not exercised by Captain Fegen in stowing the sardine meal in No. 1 lower hold of the "Venice Maru."

(51) The fire on board the "Venice Maru" created an imminent physical peril common to vessel and cargo. The voluntary sacrifices made in the efforts to extinguish the fire by the use of water and steam successfully averted this common peril. The "K" Line also subsequently incurred various expenses and made certain disbursements of a general average nature.

[fol. 1989]

CONCLUSIONS OF LAW

(1) The stowage of 665.6 tons of sardine meal in a substantially solid mass in No. 1 lower hold of the "Venice Maru" for the long voyage from Kobe to U. S. Atlantic Coast ports via the Panama Canal constituted negligence and such negligence was a proximate cause of the fire.

(2) The duty to stow cargo properly is considered delegable in determining whether there was design or neglect of the shipowner personally within the provisions of the Fire Statute. There was not any negligence in the delegation of the duty to plan and supervise the stowage of the sardine meal to Captain Fegen, an experienced Lloyd's Agent's Marine Surveyor.

(3) The negligent stowage of the sardine meal in No. 1 lower hold by Captain Fegen was not neglect of the owner personally and does not deprive the "K" Line of its right to exoneration under the Fire Statute.

(4) Mr. Okubo, Acting President and General Manager of the "K" Line, was not negligent in failing to inform or to instruct any one else to inform Captain Fegen of the experiences of the "K" Line with overheating of sardine meal previously carried on at least three voyages of other "K" Line vessels although Mr. Okubo knew that sardine meal constituted a considerable portion of the cargo of the "Venice Maru" and that some part of the large shipment of meal might be stowed in a lower hold.

(5) Mr. Okubo, the Acting President and General Manager of the "K" Line, was not negligent in failing to make arrangements, upon learning after the "Venice Maru" sailed from Japan of the stowage of cargo on the weatherdeck of the vessel, to have such cargo shipped under deck after the vessel reached Los Angeles.

[fol 1990] (6) Mr. Okubo, the Acting President and General Manager of the "K" Line, was not negligent, upon learning after the "Venice Maru" sailed from Japan of the stowage of cargo on the weatherdeck of the vessel, in failing to consult Captain Fegen concerning such deck cargo.

(7) Mr. Okubo, the Acting President and General Manager of the "K" Line, was not negligent in failing to issue special instructions as to stowage and care of the sardine meal to the officers of the "Venice Maru."

(8) The stowage on deck of cargo shipped under clean bills of lading constituted a deviation, but does not deprive the "K" Line of its right to exoneration under the Fire Statute unless it was a cause of the fire and not even then unless the deviation was the result of the neglect or design

of "K" Line personally, which the claimants have failed to show.

(9) Though the stowage of deck cargo on the weather-deck hatch may have interfered in some measure with the ventilation of the cargo under deck and may have hindered efforts to prevent the outbreak of the fire, the claimants have failed to establish that the stowage on the hatch covers was the result of design or neglect of the "K" Line.

(10) The "K" Line is entitled to exoneration of all liability under the Fire Statute except contribution in general average.

(11) The record does not disclose any negligence on the part of Kabushiki Kaisha Kawasaki Zosenjo or of any persons for whose acts it is responsible. It is entitled to exoneration of all liability under the Fire Statute, assuming there otherwise were liability.

(12) A ship owner who is exonerated from liability by the Fire Statute does not thereby become entitled to general average contribution. His right to such contribution must rest upon an agreement.

[fols. 1991-1998] (13) The Jason Clause in the bills of lading, which provides that, "if the shipowner shall have exercised due diligence to make the vessel in all respects seaworthy," the cargo owners shall contribute with the shipowner in general average in case of disasters caused by unseaworthiness, refers to due diligence of the owner in words almost identical with those used in Section 3 of the Harter Act and accordingly such words are to be similarly construed as meaning that the owner is not entitled to such contribution if his agents fail to exercise due diligence.

(14) Due diligence to make the vessel seaworthy had not been exercised by Captain Fegen in stowing the sardine meal in No. 1 lower hold and the vessel was unseaworthy by reason of such stowage. The Jason Clause does not apply and the general average deposits exacted by "K" Line from cargo claimants must be returned with interest.

(15) The prayer for exoneration of the petitioner, Kabushiki Kaisha Kawasaki Zosenjo, should be granted with costs, and all claims should be dismissed as against it.

(16) The prayer for exoneration of the petitioner, Kawasaki Kisen Kabushiki Kaisha, should be granted, and all claims except contribution in general average should be dismissed as against it excepting further (1) so much of the claim of Fritz Reiber as represents a general average deposit made by said claimant in the sum of \$575, with interest on the sum of \$1,935 from September 15, 1934 to January 9, 1935 and interest on \$575 from January 9, 1935, and (2) so much of the claim of York Feather and Down Corporation as represents a general average deposit made by said claimant in the sum of \$509.05 with interest from September 14, 1934.

Dated, New York, N. Y., July 29, 1941.

William Bondy, District Judge,

[fol. 1999] In UNITED STATES DISTRICT COURT

FINAL DECREE—July 29, 1941

Present: Hon. William Bondy, D. J.

A petition having been filed herein on or about November 16, 1934, by Kabushiki Kaisha Kawasaki Zosenjo, as Owner, and Kawasaki Kisen Kabushiki Kaisha, ~~the~~ Bare-boat Charterer of the S.S. "Venice Maru" praying for exoneration from or limitation of liability for any loss, damage, destruction, injury or any claim whatsoever in any way arising out of or in consequence of a fire on board the S.S. "Venice Maru," extending from on or about August 6th to on or about August 11th, 1934, while the vessel was on a voyage with cargo from Japanese ports to U. S. Atlantic Coast ports as more fully described in said petition and for certain other relief;

And security in the form of an *ad interim* stipulation for value having been filed herein on November 16, 1934, by the said petitioners and the Court having approved the filing thereof by its order dated November 17, 1934;

And the Court by its said order of November 17, 1934, having directed a monition to issue in the usual form and having thereaf'er and on or about November 20, 1934,

issued its monition, pursuant to said order against all persons claiming damages by reason of the matters aforesaid, citing and requiring all such persons to appear before the Court and make due proof of their respective claims and to answer the petition on or before the 31st day of [fol. 2000] December, 1934, at 10:30 A. M. and appointing Godfrey Updike, Esq., 150 Broadway, New York, N. Y., as the Commissioner before whom proof of claims presented pursuant to said monition should be made; and the Court having issued the usual restraining order;

And public notice of said monition having been duly given as required by law, by the practice of this Court and by said order; and copies of said monition having been duly served and mailed in accordance with the terms of said order, all of which appears from affidavits heretofore filed herein; and, upon the return of said monition, proclamation having been duly made; and time for presentation of such claims having been duly extended to January 9, 1935 by order of this Court dated December 27, 1934; and the Commissioner on January 18, 1935 having duly filed his report dated January 15, 1935 enumerating therein 129 claims which had been presented and filed pursuant to said monition, and the Court by its order dated January 21, 1935, having noted the defaults of all persons whose claims had not theretofore been presented and having ordered that all issues raised by the petition and answers thereto stand for trial before the Court according to the rules and practice thereof;

And the Court thereafter on motion having opened the aforesaid default and extended the time for filing claims of certain designated persons only to April 17, 1935, by order of the Court dated April 5, 1935, and again on motion having opened the aforesaid default and extended the time for filing claims of certain other designated persons only to August 12, 1935 by order of the Court dated July 24, 1935, and again on motion having opened the aforesaid default and extended the time for filing claims of certain other designated persons only to April 15, 1938 by order of the Court dated March 25, 1938; and the Commissioner having filed on May 29, 1935 a supplemental report dated May 29, 1935 enumerating three additional [fol. 2001] claims which had been presented and filed pursuant to the aforesaid order of the Court dated April 5, 1935,

and on October 15, 1935, having filed his further supplemental report dated October 14, 1935 enumerating 42 additional claims which had been presented and filed pursuant to the aforesaid order of the Court dated July 24, 1935, and on May 12, 1938 having filed his final supplemental report dated May 11, 1938, enumerating 45 additional claims which had been presented and filed pursuant to the aforesaid order of the Court dated March 25, 1938;

And objections having been duly filed by the petitioners to all of the aforesaid claims; and answers to the petition having been filed herein by certain claimants on their own behalf and on behalf of all other claimants similarly situated contesting petitioners right to exoneration from or limitation of liability, and Counsel for all other claimants and for petitioners having agreed that said answers should stand for all other claimants; and the time of all claimants to present claims and to answer the petition having expired;

And this cause having duly come on for trial and final hearing before this Court on the pleadings and proofs of the respective parties and having been argued and submitted by their advocates;

And the Court, after due deliberation, having filed its opinion in writing, dated March 31, 1941, by which opinion it was among other things held that the fire and the loss, destruction, damage and injury arising therefrom were not caused by the design or neglect of the petitioners or either of them and that Kabushiki Kaisha Kawasaki Zosenjo was entitled to exoneration from liability therefor; and that Kawasaki Kisen Kabushiki Kaisha was entitled to exoneration from liability therefor except contribution in general average.

And the Court having made and filed its findings of fact and conclusions of law;

[fol. 2002] And the costs of the petitioner, Kabushiki Kaisha Kawasaki Zosenjo having been duly taxed in the sum of \$14,237.41;

Now, upon motion of Crawford & Sprague, Proctors for petitioners, it is, by the Court

Ordered, adjudged and decreed that the defaults of all persons and corporations, who may have sustained any loss, destruction, damage or injury caused by, arising out of or resulting from the fire described in the petition and who have not heretofore filed claims herein, be and they

are hereby noted and entered and that the defaults of all such persons and corporations, who have failed to file answers herein, be and they hereby are noted and entered, and that the filing and presentation hereafter of any such claims or answers except for contribution in general average be and are forever barred and restrained, and it is further

Ordered, adjudged and decreed that the fire described in the petition was not caused by the design or neglect of the petitioners, Kabushiki Kaisha Kawasaki Zosenjo and Kawasaki Kisen Kabushiki Kaisha, or either of them, and did not occur with the privity or knowledge of said petitioners or either of them; and it is further

Ordered, adjudged and decreed that the petitioner, Kabushiki Kaisha Kawasaki Zosenjo, be and it hereby is forever exonerated and discharged from liability for any loss, damage, destruction, injury, or any other claim whatsoever in any way caused by, arising out of or resulting from the said fire; and it is further

Ordered, adjudged and decreed that the petitioner, Kawasaki Kisen Kabushiki Kaisha, be and it hereby is forever exonerated and discharged from liability for any loss, [fol. 2003] damage, destruction, injury or any other claim whatsoever in any way caused by, arising out of or resulting from the said fire, excepting only contribution in general average; and it is further

Ordered, adjudged and decreed that the petitioner, Kawasaki Kisen Kabushiki Kaisha, is not entitled to retain general average deposits exacted by it from claimant, Fritz Reiber, and claimant, York Feather & Down Corporation, before delivery of cargo, but must return the same with interest to said claimants respectively; and it is further

Ordered, adjudged and decreed that all persons or corporations, having or claiming to have sustained any loss, damage, destruction or injury by reason of or in connection with the fire referred to in the petition, be and they hereby are perpetually enjoined and restrained from instituting or prosecuting in any manner whatsoever in this or in any other proceeding, suit or action in any court or in any country any claim, action, suit or proceeding whatsoever against the petitioner, Kabushiki Kaisha Kawasaki Zosenjo or its successor; and it is further

Ordered, adjudged, and decreed that all persons or corporations, having or claiming to have sustained any loss, damage, destruction or injury by reason of or in connection with the fire referred to in the petition, be and they hereby are perpetually enjoined and restrained from instituting or prosecuting in any manner whatsoever in this or in any other proceeding, suit or action in any court or in any country any claim, action, suit or proceeding whatsoever, excepting only contribution in General Average, against the petitioner, Kawasaki Kisen Kabushiki Kaisha or its successor or against the S. S. "Venice Maru" her engines, etc. and her freight and passage moneys, or against any other vessel or property of the said petitioner or of its successor; and it is further

[fol. 2004] Ordered, adjudged and decreed that all claims heretofore filed herein be and they hereby are dismissed on the merits as against the petitioners, Kabushiki Kaisha Kawasaki Zosenjo; and it is further

Ordered, adjudged and decreed that all claims other than for contribution in general average heretofore filed herein be and they hereby are dismissed on the merits as against the petitioner, Kawasaki Kisen Kabushiki Kaisha, excepting only (1) so much of the claim of Fritz Reiber as represents the general average deposit paid by him, (2) so much of the claim of York Feather & Down Corporation as represents the general average deposit paid by it; and it is further

Ordered, adjudged and decreed that the claimant Fritz Reiber, have and recover from the petitioner Kawasaki Kisen Kabushiki Kaisha, and of or from its ad interim stipulator for value, the sum of \$575, as and for the general average deposit paid by him with interest on \$1360 from September 15, 1934 to January 9, 1935, amounting to \$25.99, and interest on \$575 from September 15, 1934, to date hereof, amounting to \$235.24 being a total of \$836.23, and that said claimant have judgment and execution therefor as provided by law and by the rules of this Court; and it is further

Ordered, adjudged and decreed that the claimant, York Feather & Down Company, have and recover from the petitioner, Kawasaki Kisen Kabushiki Kaisha, and of or from its ad interim stipulator for value, the sum of \$509.05 as and for the general average deposit paid by it with interest thereon from September 14, 1934, amounting to \$208.35

being a total of \$717.40, and that said claimant have judgment and execution therefor as provided by law and by the rules of this Court; and it is further

Ordered, adjudged and decreed that said petitioner Kabushiki Kaisha Kawasaki Zosenjo have and recover [fol. 2005] from the claimants, and of and from their stipulators for costs (to the extent of their stipulations), the sum of \$14,237.41, petitioner's costs incurred in establishing its exoneration from or limitation of liability in this proceeding, as taxed, and that said petitioner have judgment and execution therefor as provided by law and by the rules of this Court; and it is further

Ordered, adjudged and decreed that such cargo claimants who have heretofore duly filed claims in this proceeding and who have valid claims in general average for sacrifices made for the safety of the common adventure, do have and recover of and from the Kawasaki Kisen Kabushiki Kaisha and its stipulators for value, the net amounts due such claimants in general average and that such claims be referred to William N. Davey, Esq., as Commissioner, to ascertain and compute the net amounts respectively due such claimants in general average and to report thereon to this Court with all convenient speed; and it is also hereby further

Ordered, adjudged and decreed, that the prayer of the petitioner, Kawasaki Kisen Kabushiki Kaisha, for limitation of its liability to the value of the S.S. "Venice Maru" and her pending freight be and the same hereby is granted and that the liability of said petitioner for all claims in general average against it arising out of this voyage of the S.S. "Venice Maru" shall not exceed the value of the S.S. "Venice Maru" and her pending freight and that the Commissioner above named shall take proof thereon and report to this Court with all convenient speed; and it is also hereby further

Ordered that the question of the allocation of the costs of this proceeding as between the petitioner, Kawasaki Kisen Kabushiki Kaisha, and the various classes of claimants herein be deferred until the entry of final decree herein.

William Bondy, United States District Judge.

[fol. 2006] IN UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK

NOTICE OF APPEAL AND ORDER OF ALLOWANCE

SIRS:

Please take notice that cargo claimants, Consumers Import Co., Inc., and their stipulators for costs hereby appeal to the United States Circuit Court of Appeals for the Second Circuit from the decree of the District Court, entered herein on August 1, 1941, in so far as:

[fol. 2007] 6. It decrees that all persons or corporations having or claiming to have, sustained any loss, damage, destruction or injury by reason of, or in connection with, the fire referred to in the petition, are perpetually enjoined and restrained from the instituting or prosecuting in any manner whatsoever in this or in any other proceeding, suit, or action in any court or in any country, any claim, action, suit or proceeding whatsoever, excepting only contribution in general average, against petitioner, Kawasaki Kisen Kabushiki Kaisha, or its successor, or against the steamship "Venice Maru," her engines, etc., and her freight and passage moneys, or against any other vessel or property of the said petitioner or of its successor.

7. It decrees that petitioner, Kabushiki Kaisha Kawasaki Zosenjo, is forever exonerated and discharged from liability for any loss, damage, destruction, injury, or any other claim whatsoever in any way caused by, arising out of, or resulting from the said fire.

8. It decrees that all claims heretofore filed herein are dismissed on the merits as against petitioner, Kabushiki Kaisha Kawasaki Zosenjo.

9. It decrees that all persons or corporations having or claiming to have sustained any loss, damage, destruc-

* The names of the other 203 cargo-claimants set forth in the original are not printed by agreement between counsel.

tion, or injury by reason of or in connection with the fire referred to in the petition are perpetually enjoined and restrained from instituting or prosecuting in any manner whatsoever in this or in any other proceeding, suit or action in any court, or in any country, any claim, action, [fol. 2008] suit or proceeding whatsoever against petitioner, Kabushiki Kaisha Kawasaki Zosenjo, or its successor.

10. It decrees that petitioner, Kabushiki Kaisha Kawasaki Zosenjo, have and recover from the claimants, and of and from their stipulators for costs (to the extent of their stipulations), the sum of \$14,237.41, said petitioner's costs as taxed, and that said petitioner have judgment and execution therefor.

Dated, New York, N. Y., August 8th, 1941.

Yours, etc., Bigham, Englar, Jones & Houston,
Proctors for Cargo Claimant, Consumers Import
Co., Inc., and 182 Other Cargo Claimants, 99 John
Street, New York City. Hill, Rivkins & Middleton,
Proctors for Cargo Claimant, Winckler & Com-
pany, and 15 Other Cargo Claimants, 60 Wall
Street, New York City. Hatch & Wolfe, Proctors
for Cargo Claimant, Haruta & Co., Inc., and 4
Other Cargo Claimants, 70 Pine Street, New York
City.

To Messrs. Crawford & Sprague, Proctors for Petitioners,
117 Liberty Street, New York City.

The foregoing appeal is hereby allowed this 11th day of
August, 1941.

Edward A. Conger, U.S.D.J.

[fols. 2009-2018] IN UNITED STATES DISTRICT COURT,
SOUTHERN DISTRICT OF NEW YORK

ASSIGNMENT OF ERRORS

Cargo claimants, Consumers Import Co., Inc.;* hereby assign error in the opinion of the District Court herein dated March 31, 1941, in the Findings of Fact and Conclu-

* The names of the other 203 cargo claimants set forth in the original are not printed by agreement between counsel.

sions of Law filed herein and in the Decree of the District Court entered herein on August 1, 1941, as follows:

• • • • •
[fol. 2019] 50. In that the District Court erred in holding that the vessel owner, Kabushiki Kaisha Kawasaki Zosenjo, is entitled to exoneration of all liability with respect to particular average damage under the Fire Statute.

51. In that the District Court erred in holding that all claims heretofore filed herein should be dismissed on the merits as against petitioner, Kabushiki Kaisha Kawasaki Zosenjo, the owner of the steamship "Venice Maru."

• • • • •
53. In that the District Court erred in holding that all persons or corporations having or claiming to have sustained loss, damage, destruction or injury by reason of, or in connection with, the fire referred to in the petition should be perpetually enjoined and restrained from instituting or prosecuting in any manner whatsoever in this or in any other proceeding, suit, or action in any court or in any country, any claim, action, suit or proceeding whatsoever, excepting only contribution in general average, against petitioner, Kawasaki Kisen Kabushiki Kaisha, or its successor, or against the steamship "Venice Maru," her engines, etc., and her freight and passage moneys, or against any other vessel or property of said petitioner or its successor.

• • • • •
[fol. 2020] 55. In that the District Court erred in holding that all persons or corporations having or claiming to have sustained any loss, damage, destruction or injury by reason of, or in connection with, the fire referred to in the petition, should be perpetually enjoined and restrained from instituting or prosecuting in any manner whatsoever in this or in any other proceeding, suit or action in any court or in any country, any claim, action, suit or proceeding against petitioner, Kabushiki Kaisha Kawasaki Zosenjo, or its successor.

56. In that the District Court erred in failing to hold that petitioner, Kabushiki Kaisha Kawasaki Zosenjo, the

owner of the steamship "Venice Maru," was, to the extent of the value of said vessel, her engines, etc., liable for claims for contribution in general average arising from the fire referred to in the petition herein and the sacrifices of cargo made in connection therewith.

[fol. 2021-2039] 61. In that the District Court erred in failing to hold that the cargo claimants were entitled to recover from the petitioners for all particular average damage sustained by their cargo during the voyage in question.

62. In that the District Court erred in holding that petitioner, Kabushiki Kaisha Kawasaki Zosenjo, should have and recover costs from the claimants and of and from their stipulators for costs.

Dated, New York, N. Y., August 8th, 1941.

Bigham, Englar, Jones & Houston, Proctors for Cargo Claimant, Consumers Import Co., Inc., and 182 Other Cargo Claimants, 99 John Street, New York City.

Hill, Rivkins & Middleton, Proctors for Cargo Claimant, Winckler & Company, and 15 Other Cargo Claimants, 60 Wall Street, New York City.

Hatch & Wolfe, Proctors for Cargo Claimant, Haruta & Co., Inc., and 4 Other Cargo Claimants, 70 Pine Street, New York City.

[fol. 2040] UNITED STATES CIRCUIT COURT OF APPEALS FOR
THE SECOND CIRCUIT, OCTOBER TERM, 1942

No. 120

(Argued December 11, 1942. Decided January 25, 1943)

CONSUMERS IMPORT CO., INC., et al., Appellants,

v.

KAWASAKI KISEN KABUSHIKI KAISHA, et al., Appellees

Appeal by the claimants from a decree in the admiralty of the District Court for the Southern District of New York in a proceeding under the Fire Statute to exonerate from liability both the owner and the bareboat charterer of a vessel.

Before L. Hand, Swan and Chase, Circuit Judges

T. Catesby Jones, for the appellants.

George C. Sprague, for the appellees.

[fol. 2041] L. HAND, Circuit Judge:

This appeal comes before us from a decree in the admiralty exonerating the owner and the bareboat charterer of the S.S. "Venice Maru" from liability for damage to her cargo by a fire which occurred on board that vessel between Los Angeles and Balboa in August 1934. The appeal also involves the repayment by the bareboat charterer of certain cash payments made to it by cargo owners as contributions in general average. The decree directed the charterer to refund these and the charterer and the owner have filed cross assignments of error. We shall first consider the appeal of the cargo claimants.

The "Venice Maru," having previously stopped at several Japanese ports to take on cargo and being already partly filled, on July 5, 1934, touched at Kobe where she lifted a consignment of some 1900 tons of sardine meal in 38,000 bags, destined for Atlantic ports in the United States, via the Panama Canal. In No. 1 lower hold she stowed 13,312 bags; in No. 3 lower hold 11,848; in No. 6 lower hold, 6,735; and in No. 3 tweendeck, 6,069. After Kobe she touched at Nagoya where she lifted 1,087 cases of porcelain goods which were stowed upon the weatherdeck, and later at Yoko-

hamia 595 more cases of porcelain were added, also as deck-load. Thus, when she finally broke ground at that, her last Japanese port, on July 13th she had all holds full and a deck cargo covering most of her free deck space, among the rest the after two-thirds of No. 1 weatherdeck hatch. During the voyage to Los Angeles where she arrived on July 29th, she met with heavy rains that prevented her from ventilating the cargo as well as she had expected, but she suffered no misadventure. She discharged a few tons at that place, and left on July 30 for Balboa. The weather en route was good but hot, and early in the morning of August 6 smoke began to come out of the ventilator of No. 1 lower hold. Examination showed that some of the bags of sardine meal there [fol. 2042] stowed had heated and were smoking, and fire finally broke out. Although only some 700 bags of meal were burnt or charred, much damage was done to the other bags and to other cargo by the water used to put out the fire. At Balboa or at Panama she discharged that part of her cargo which had been consigned to different Central, and South American ports, and restowed the sardine meal that was in lower holds 3 and 6. In restowing she divided this meal into small blocks with channels running between them; this was known as the "block and channel" method; it did not come into general use for sardine meal until 1935. At New York the charterer demanded general average guarantees, and in some cases cash, as a condition upon delivery of cargo, and later a general average adjustment was made. The cash payments are those involved in the cross-appeals. The sardine meal-laden at Kobe was well within the range of high grade Japanese sardine meal; the bags were proper, and the cargo was fit for carriage by sea from Kobe to New York when properly stowed and ventilated. No. 1 lower hold was from 20 to 23½ feet deep; above it was the lower tweendecks 9½ feet deep, and above that a second tweendecks, or shelter deck compartment, 8 feet deep. Six hundred and sixty-five tons of the meal—a little more than one-third of the whole consignment—were stowed in No. 1 hold, and occupied the entire hold except for a space of about a foot or eighteen inches along the bulkheads and along the sides of the ship, and for about the same space between the top of the stow and the overhead deck beams. A channel one foot wide ran athwartship through the middle, except for which the stow was a solid block. Five rows of "rice venti-

"lators" ran fore and aft in the 5th, 10th and 16th tiers, and six rows athwartship in the 6th, 11th and 17th tiers; vertical ventilators connected these horizontal ventilators at the four corners of the hatch. Besides these there was a permanent ventilating system such as was usual in ships of her class.

[fol. 2043] Sardine meal, like other fish meal, when stowed on long voyages, is likely to heat and to take fire spontaneously; its susceptibility depends upon the percentage of moisture and oil which it contains. It had been a common cargo from Japan to Pacific coast ports in small parcels for five or more years before this voyage of the "Venice Maru," and no damage had ever occurred; the charterer had itself successfully carried it on over eighty voyages before September 1, 1933, and in one of these, that of the S.S. "Florida" on December 23, 1930, the cargo was nearly as great as on the "Venice Maru." The charterer's first shipment to Atlantic ports was on February 3, 1933, followed by eight other steamers—the largest consignment in which was 1100 tons: all came through undamaged. On September 1, 1933, however, the cargo of the "Montreal Maru," which had left Yokohama with 2300 tons, was found to have been in part heated at its outturn in New York on October 6. Three steamers followed to New York without incident, but on December 6th, the "Soyo Maru," which had left Yokohama on October 28, arrived in New York with about 1000 tons, also heated. Ten ships then followed to New York all without damage. On April 5, 1934, the "Soyo Maru" again left Yokohama with 1100 tons; the "Tohsei Maru" on the 25th with 560 tons; the "Nichiyo Maru" on the 28th with 1117; and the cargoes of all three heated. In the case of the last two this happened in spite of the use of "rice ventilators." The charterer attributed this to the quality of the meal itself, which had been manufactured at a small factory near Nagoya; and for that reason it refused to take any further meal from that shipper. Two cargoes were then despatched and arrived in good condition; but not so, the cargoes of the "Montreal Maru" leaving Yokohama on June 14th and arriving in New York on July 20th, or of the "Getsuyo Maru," leaving Yokohama on June 28th, and arriving in New York on July 29th. Although neither of these last two [fol. 2044] vessels contained any Nagoya meal and both carried "rice ventilators," the cargo of each heated.

After the charterer learned of the damage done on the three ships leaving in April, the latest of which, the "Tohsei Maru" arrived on June 1st, it not only gave directions to take no more of the Nagoya meal, but it retained one, Fegen, to take charge of the stowage of any future shipments, and the first ship which he stowed was the "Getsuyo Maru." He had been a marine surveyor for 23 years, all the time in Kobe acting as Lloyds' agent; he had surveyed all sorts of cargoes including sardine meal; before becoming a surveyor he had had twenty years sea experience from seaman to captain; and he held a master's license both on British and Japanese ships. Although as a master he had never carried sardine or other fish meal, he had frequently carried another perishable cargo, rice, and was familiar with the use of "rice ventilators." It was he who had stowed No. 1 lower hold of the "Venice Maru" in the way we have described. The charterer's business was in charge of one, Okubo, who lived in Kobe, and who alone had the active direction of its affairs, although it had a president, who was inactive. Okubo knew of the previous heating of all the cargoes mentioned except those leaving in June; he did not tell Fegen of these when he retained him, and he paid no further attention to the stowage.

A preliminary question arises as to the liability of the ship *in rem*, assuming that the owner is not liable *in personam*. The claimants argue that the statute does not destroy any liens upon the ship, for it is to be read *in pari materia* with §183 of Title 46, U. S. Code. Such indeed appears to have been the opinion of the Fifth Circuit in *The Etna Maru*, 33 Fed. (2d) 232, which also held that unseaworthiness of the ship barred exoneration under the Fire Statute. So far as that decision retains any authority after *Earle & Stoddard v. Wilson Line*, 287 U. S. 420, we cannot [fol. 2045] agree: §182 gives complete exoneration of liability; §183 only a limitation of liability. To say that an owner is completely exonerated, although one may arrest his ship and sell it, is a contradiction in terms, unless we are to think of the ship as a jural person capable of wrongdoing. That notion has indeed had its place in the law of the sea, but it is a bit of mythology, a fiction not to be applied to defeat a statute designed to protect and foster maritime enterprise. Whether, if the charterer were liable *in personam*, a lien would attach to the ship on the theory that a

bareboat charterer is the owner *pro hac vice*, we need not say, for, as will appear, we agree that it was not liable, *in personam*.

It could be so only in case the fire was "caused" by its "design or neglect"; and "neglect" means personal, and not imputed, negligence. *Earle & Stoddard v. Wilson Line*, *supra* (287 U. S. 420). Only Okubo and Fegen can be even plausibly suggested as standing in the required relation to the charterer; and, although Okubo certainly did stand so, Fegen did not. Since the claimants argue otherwise we will consider the evidence in a little detail. In answer to interrogatories Okubo swore that "in case of sardine meal" the charterer "employed * * * Fegen to advise with the masters and chief officers on its loading and stowage in their respective vessels." Again, that the master and chief officer of the "Venice Maru" "supervised" the stowage "and, insofar as the loading and stowage of sardine meal was concerned, were advised by Mr. F. H. Fegen." Upon letters rogatory he swore that the charterer "employed * * * a surveyor * * * to inspect stowage on every vessel." Fegen swore that he "was appointed by Cornes & Co. at Kobe to lay out the manner and method of stowage of the sardine meal and to supervise such stowage * * * and I believe that Cornes & Co. were employed by Kawasaki Kisen Kabushiki Kaisha"; that he did so "and gave instructions to Chief Officer of the 'Venice Maru' [fol. 2046] regarding manner and method of the stowage and arrangement of ventilation and also exercised supervision over said stowage and ventilation." This was very far from making Fegen the local manager at Kobe. It was Okubo who had that position, and whose personal dereliction was necessary to fix any liability upon the charterer for damage by fire. *Earle & Stoddard v. Wilson Line*, *supra* (287 U. S. 420); *William S.S. Co. v. Wilbur*, 9 Fed. (2) 622 (C. C. A. 9); *United States v. Charbonnier*, 43 Fed. (2) 174 (C. C. A. 4). The test is the same as that under the Limitation Statute (183; Title 46, U. S. Code, *Craig v. Continental Insurance Co.*, 141 U. S. 638, 646). Unless therefore Okubo was personally guilty of some negligence, the charterer was exonerated.

The claimants say that he was so guilty because he knew of the heating of the meal in the autumn of 1933 upon the "Montreal Maru" and the "Soyo Maru," and upon the

three ships in April, 1934, and because it was not enough merely to turn over the stowage to Fegen; particularly as he did not tell Fegen of the heating on the earlier voyages. In addition they say that Okubo was personally chargeable because two-thirds of the hatch of No. 1 hold was covered with deck cargo; and finally, because he did not detain the "Venice Maru" at Los Angeles and restow the meal after news had reached Japan that the cargo on the "Getsuyo Maru" had gone wrong. We agree that, although Okubo was not personally acquainted with what was necessary to protect the meal on such a long voyage, he had had ample notice that it was subject to heating. Moreover, heating can lead to fire, and failure to prevent heating would be a "cause" of any resulting fire. If therefore, in July, 1934, Okubo had taken no action the charterer might well have been liable. *Hines v. Butler*, 278 Fed. Rep. 877, 880 (C. C. A. 4); *Williams S.S. Co. v. Wilbur*, 9 Fed. (2) 622 (C. C. A. 9); *Bank Line Ld. v. Porter*, 25 Fed. (2) 843 (C. C. A. 4); *The Elizabeth Dantzer*, 263 Fed. Rep. 596. We think that he took adequate action.

[fol. 2047] He believed that the three April cargoes which went wrong (in spite of the use of "rice ventilators" in two of them), had carried bad meal and, as we have said, he stopped all shipments from Nagoya. Two cargoes then came through safely, which, according to Kitamura, did not carry Nagoya meal. But Okubo did not rest with this, for he also retained Fegen. The claimants say that Fegen was not shown to have been competent, or at least that Okubo had no means of knowing whether he was. Fegen had had long experience at sea and ashore in the stowage of ships and the ventilation of cargoes, although he had had no actual sea experience with sardine meal, or apparently with other fish meal. The stowage of sardine meal was still in flux; it was not till the next year that "block and channel" stowage became the standard; and, although it is true that the larger the solid block and the longer the voyage, the more likely the meal is to heat, "rice ventilators" had for long been an accepted way of ventilating other heating cargoes. In July, 1934, it had not yet certainly appeared that, given properly made meal, such ventilators were not adequate to protect even such a large single block as half of 665 tons. (We say "half" advisedly, because, as we have said, the stow in No. 1 lower hold was cut into two blocks by a channel one foot wide.)

There is not the least evidence that anyone better qualified was available at Kobe, or, indeed, anywhere else in Japan. Nor can we say that Okubo's failure to tell Fegen of the earlier cargoes that heated, was negligent. He was justified in assuming that Fegen would familiarize himself with the charterer's past experience by inquiring of its masters. Besides, even if it was negligent not to inform him, it does not appear that Fegen did not inform himself; or that, if he did not, his ignorance made any difference; *i. e.*, that his knowledge of the charterer's past experience would have led him to discard "rice ventilators." Since the claimants have the burden of proving "neglect" under this statute—unlike the Limited Liability Statute—they must in any event fail upon [fol. 2048] this issue, for by no stretch can it be said that they proved that the fire was "caused" by Fegen's ignorance of the charterer's past experience. *The Strathdon*, 89 Fed. Rep. 374, 378; *The Salvore*, 60 Fed. (2) 683 (C. C. A. 2); *The Older*, 65 Fed. (2) 359 (C. C. A. 2).

The next claim is that the "Venice Maru," not only carried deck cargo, but stowed it upon the after two-thirds of No. 1 hatch. On July 11th the charterer received the cable of the "Venice Maru's" master at Kobe, saying that he had laded 450 tons of deck cargo and wished tarpaulins to be supplied him at Yokohama. Kitamura showed this to Okubo on the 16th, three days after the ship had left Yokohama, her last Asiatic port of call. Okubo could have done nothing till she got to Los Angeles, and nothing in the cable suggested that any part of the deck cargo was over the hatch. Nor could Okubo have done anything when he learned that the cargo of the "Getsuyo Maru" had heated. That vessel reached New York on July 29, the day that the "Venice Maru" reached Los Angeles. There is no evidence when Okubo first learned that the meal had heated, except of course that it could not have been before the 29th. It is most unlikely that he heard of it before the 30th, the day when the "Venice Maru" left Los Angeles. We must not clutch at such straws to find liability, or construe the Fire Statute grudgingly. Congress has in many other ways changed the law of shipping, since it was passed, but in the eternal conflict between hull and cargo, the hull has been able so far to hold this ground; and in its last decision the Supreme Court showed no hostile disposition towards the statute. (*Earle & Stoddard v. Wilson Line, supra*, 287 U. S. 420). We hold that the charterer and the owner were

entitled to exoneration, and that on this, the chief issue, the decree should be affirmed.

The charterer and the owner challenged the finding that the storage had been negligent and made the ship unseaworthy [fol. 2049]. If the stowage was such as made a fire likely, they apparently agree that she was unseaworthy; and she was, whether they agree or not. It follows that, if due diligence was not used in her stowage, due diligence was not used to make her seaworthy. Moreover, as to this issue, we are to look not alone to Okubo's conduct, for that duty is not delegable, although this the charterer and the owner dispute. The ship's bills of lading provide: "If the shipowner shall have exercised due diligence to make the steamer *** seaworthy *** in case of *** damage *** resulting from accident *** or from unseaworthiness *** if the *** unseaworthiness was not discoverable by the exercise of due diligence" the cargo should contribute in general average. The charterer argues that, although it is true in cases arising under the Harter Act, the owner must show that due diligence has been used in order to hold a shipper for contribution in general average, it is because the Harter Act forbids an owner to relieve himself of the duty to use due diligence. But it says that that is not true under the Fire Statute which permits the owner to delegate all his duties to others, provided he selects proper delegates. Hence an owner may provide for contribution in general average to fire losses, although due diligence has not been used to make the ship seaworthy; and the doctrine of *The Jason*, 225 U. S. 32, does not apply to the full. We need not decide that question, because in any event the bills of lading must themselves provide for contribution notwithstanding the lack of due diligence to make the ship seaworthy. If they do not, the doctrine of the *Irrawaddy*, 171 U. S. 187, applies, and the owner being in unexcused fault cannot exact contribution.

The charterer says that the bills of lading did so provide because of the introduction in them of the word, "accident," which appears in the quoted language. We are not indeed clear what that added, but it makes no difference, for even [fol. 2050] if it covered a fire, the whole clause was subject to its introductory condition: "the shipowner shall have exercised due diligence to make the steamer in all respects seaworthy"; and to the later clause: "if the defect or unseaworthiness was not discoverable by the exercise of

due diligence." Certainly, when these two are read together, they cover more than a personal default of the shipowner; being primarily applicable to cases arising under the Harter Act, they make it a condition that due diligence shall have been exercised to make the ship seaworthy: *i.e.*, in the case at bar that she was so stowed as not to be likely to catch fire. Thus arises the correctness of the judge's findings that the "stowage was negligent and made the vessel unseaworthy."

An immense amount of testimony was taken as to the proper stowage of such cargo; and a very large part of it, especially that of expert surveyors and master mariners, was taken in court. The judge found, not only that the stowage was negligent, but that Fegen had not used "due diligence" to make the vessel seaworthy. Should we say that this finding was "clearly erroneous"? *Petterson Lighterage & Towing Corporation v. New York Central Railroad Company*, 126 Fed. (2) 992 (C. C. A. 2). The proper stowage of sardine, or other fish, meal has come before the courts in several cases and it so happens that the ship has always been found guilty of bad stowage. *Wilbur v. Williams S.S. Co.*, 9 Fed. (2) 940; affirmed 9 Fed. (2) 662 (*supra*); *The Neil Maersk*, 18 Fed. Supp. 824; affirmed as to the stowage, 91 Fed. (2) 932 (C. C. A. 2); *The Nichiyo Maru*, 14 Fed. Supp. 727, affirmed 89 Fed. (2) 539 (C. C. A. 4). That does not of itself answer the question at bar, for each stow is different, but Judge Chesnut's careful analysis of the evidence in the case of the three April, 1934, ships of the charterer now at bar, fits very closely here. As a new question we should be somewhat tempted to accept the opinion of the claimants' expert, Eriksen, that, by itself, the stowage "was about on the minimum of adequateness" before the covering of the hatch blocked the [fol. 2051] vertical "rice ventilators" which came up to its after side; but that when it was covered that "destroyed the minimum requirements of ventilation." Again we should be disposed to believe that the "rice ventilators" were themselves not adequate. At least so thought the two surveyors who saw the discharge at Balboa, and who said that they were too fragile anyway. We do not forget that the master of the "Venice Maru" swore that these surveyors had not seen the ventilators in place and that they were broken on the discharge, but that does not answer their testimony. Nor do we forget the sharp dispute as to

whether it affected the ventilation of the stow to cover the hatch, although it surprises us to have it said that it should not, especially since the hold was plainly planned to be ventilated at all four corners. We do not think it necessary to hold that the use of "rice ventilators" was of itself negligence. As we said at the outset, the proper stowage of such meal was still in flux in the summer of 1934, although the "block and channel" method turned out in the end to be better than "rice ventilators," in spite of the opinion of one expert. But in the case at bar there was evidence that the "rice ventilators" had not been themselves adequate and that the deck cargo obstructed them. We can have no assurance that out of the confusion and contradiction of such a record, we can come to a more reliable result than the judge. We cannot know, for example, how far he was led to find as he did by the testimony of those witnesses whom he saw; and, indeed, even as to those whom he did not see, his conclusions have some *prima facie* weight; we are entitled to attribute some value to his sifting of the evidence. We will not say therefore that the findings were "clearly erroneous."

We see no reason to disturb the award of costs. *Kerrick v. Edes*, 19 Fed. (2) 693 (C. A. D. C.); *The Aakre*, 122 Fed. (2) 469, 475 (C. C. A. 2).

Decree affirmed.

[fol. 2052] UNITED STATES CIRCUIT COURT OF APPEALS, SECOND CIRCUIT

At a Stated Term of the United States Circuit Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the 18th day of February, one thousand nine hundred and forty-three.

Present: Hon. Learned Hand, Hon. Thomas W. Swan, Hon. Harrie B. Chase, Circuit Judges.

In the Matter of Petition of Kabushiki Kaisha Kawasaki Zosenjo, Owner and Kawasaki Kisen Kabushiki Kaisha, Bareboat Charterer of the SS Venice Maru for exoneration from or limitation of liability, Consumers Import Co., Inc., et al., Appellants

Appeal from the District Court of the United States for the Southern District of New York.

2050

This cause came on to be heard on the transcript of record from the District Court of the United States for the Southern District of New York, and was argued by counsel.

On Consideration Whereof, it is now hereby ordered, adjudged, and decreed that the decree of said District Court be and it hereby is affirmed.

It is further ordered that a Mandate issue to the said District Court in accordance with this decree.

D. E. Roberts, Clerk.

[Endorsed:] United States Circuit Court of Appeals, Second Circuit. In re Kabushiki Kaisha Kawasaki Zosenjo, etc., and another. Order for Mandate. United States Circuit Court of Appeals, Second Circuit. Filed, Feb. 18, 1943. D. E. Roberts, Clerk.

[fol. 2054] Clerk's Certificate to foregoing transcript omitted in printing.

(4850)

[fol. 2055] SUPREME COURT OF THE UNITED STATES

[Title omitted]

ORDER ALLOWING CERTIORARI—Filed May 10, 1943

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit is granted, limited to the fifth question presented by the petition. The case is transferred to the summary docket.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

[fol. 2056] SUPREME COURT OF THE UNITED STATES

STIPULATION AS TO RECORD—Filed July 15, 1943

It is hereby stipulated and agreed by and between proctors for the cargo claimants-petitioners and proctor for the respondents that the Transcript of Record to be filed herein in respect of the presentation of the question: "does the Fire Statute extinguish maritime liens for cargo damage or is its operation confined to in personam liability only"; shall consist merely of the following:

1. Petition.
2. Order of Bondy, D. J., re ad interim stipulation.
3. Ad interim stipulation.
4. Order directing issuance of monition.
5. Monition.
6. Answer to petition.
7. Interrogatories and answers thereto by Y. Kawasaki,
[fol. 2057] Managing Director of Kabushiki Kaisha Kawasaki Zosenjo.
8. Summaries of Stipulations of Fact as set forth in the Record filed in connection with the petition for a writ of certiorari in this case but omitting paragraphs B and C thereof.
9. Testimony of Mr. Shotaro Kitamura as set forth at folios 1851 to 1860 inclusive of the Record filed in connection with the petition for a writ of certiorari in this case.
10. Photostat of petitioner's Exhibit No. 9 (bill of lading).
11. Petitioner's Exhibit No. 17 (charterparty) as printed at folios 5779 to 5787 inclusive of the Record filed in con-

nection with the petition for a writ of certiorari in this case.

12. District Court opinion.
13. Finding of fact and conclusions of law of the District Court.
14. Final decree in the District Court.
15. Notice of appeal omitting therefrom paragraphs 1 to 5 inclusive.
16. Assignments of error omitting therefrom paragraphs 1 to 49 inclusive, number 52, number 54, numbers 57 to 60 inclusive, and number 63.
17. Circuit Court of Appeals opinion and order.
[fol. 2058] 18. Stipulation of counsel re Record.
19. Clerk's certificate.

The signing of this stipulation is not to be deemed a waiver of respondent's position that paragraphs numbered 7-10 inclusive of the notice of appeal (Item 15) and paragraphs numbered 61-62 of the assignments of error (Item 16) are immaterial to the question to which the argument has been limited by the Court.

Dated, New York, N. Y., July 13, 1943.

D. Roger Englar, T. Catesby Jones, Ezra G. Benedict
Fox, Thomas H. Middleton, Proctors for Cargo
Claimants-Petitioners. George C. Sprague, Pro-
tor for Respondent.

[fol. 2059] [File endorsement omitted]

[Endorsed on cover:] Enter T. Catesby Jones. File No. 47382. U. S. Circuit Court of Appeals, Second Circuit. Term No. 32. Consumers Import Co., Inc., et al., Petitioners, vs. Kabushiki Kaisha Kawasaki Zosenjo and Kawasaki Kisen Kabushiki Kaisha, Petition for a writ of certiorari, and exhibit thereto. Filed April 3, 1943. Term No. 32 O. T. 1943.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1942.

No. 881

In the Matter

of the

Petition of KABUSHIKI KAISHA KAWASAKI ZOSENJO, Owner,
and KAWASAKI KISEN KABUSHIKI KAISHA, Bareboat
Charterer of the steamship "VENICE MARU", for Exon-
eration from and Limitation of Liability.

CONSUMERS IMPORT CO., INC., et al.,
Cargo Claimants-Petitioners.

KABUSHIKI KAISHA KAWASAKI ZOSENJO and KAWASAKI
KISEN KABUSHIKI KAISHA,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE SECOND CIRCUIT
AND BRIEF IN SUPPORT THEREOF.

D. ROGER ENGLAR,
T. CATESBY JONES,
EZRA G. BENEDICT FOX,
THOMAS H. MIDDLETON,
Proctors for Petitioners.

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1942.

No.

In the Matter
of the

Petition of KABUSHIKI KAISHA KAWASAKI ZOSENJO, Owner,
and KAWASAKI KISEN KABUSHIKI KAISHA, Bareboat
Charterer of the steamship "VENICE MARU", for Exon-
eration from and Limitation of Liability.

CONSUMERS IMPORT CO., INC., et al.,
Cargo Claimants-Petitioners,

KABUSHIKI KAISHA KAWASAKI ZOSENJO and KAWASAKI
KISEN KABUSHIKI KAISHA,
Respondents.

**Petition for a Writ of Certiorari to the United States
Circuit Court of Appeals for the Second Circuit.**

*To the Honorable the Chief Justice and the Associate
Justices of the Supreme Court of the United States:*

The Consumers Import Co., Inc., and other cargo claimants similarly situated, petitioning this Court for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit against respondents, Kabushiki Kaisha Kawasaki Zosenjo and Kawasaki Kisen Kabushiki Kaisha, respectfully show:

Statement of the Matter Involved.

Petitioners are owners of cargo which was destroyed or seriously damaged in August, 1934, on board the Japanese steamship "Venice Maru," a general ship and common carrier, by reason of a fire on that vessel, while she was on a voyage from Japanese ports to U. S. Atlantic ports via the Panama Canal. Respondent Kabushiki Kisen Kawasaki Zosenjo, (hereinafter called Kawasaki Zosenjo), is the drydock company which built the "Venice Maru" and thereafter let her under a bareboat form of charter to the other respondent, Kawasaki Kisen Kabushiki Kaisha, (hereinafter called the "K" Line or the Carrier). The "K" Line was in possession of the "Venice Maru," appointed and paid her master and crew, operated her as a common carrier, and made all contracts of affreightment, including the bills of lading for the cargo in suit.

The respondents on November 16, 1934, instituted a proceeding in Admiralty in the United States District Court for the Southern District of New York, praying for exemption from or the limitation of liability in respect of claims for such loss and damage of cargo. Kawasaki Zosenjo was not a party to any of the contracts of carriage; its sole connection with the case is that petitioners, because of such loss and damage, asserted claims *in rem* against the "Venice Maru." Both respondents (referred to as petitioners in the District Court) filed a joint stipulation whereby their stipulator undertook that it would file at a later stage in the proceedings a stipulation for value in the usual form, covering the shipowner's interest in the vessel (R. 24). Thus the liability which Kawasaki Zosenjo, as shipowner, sought to defend by the petition was *in rem* against the ship, and that which the "K" Line, as charterer, sought to defend was *in personam* against it as carrier.

Both respondents claimed the benefit of the so-called Fire Statute and prayed for exoneration from liability

because the loss was caused by fire. The text of the Fire Statute is printed in the appendix. It is Sec. 182, U. S. Code, Title 46, (formerly R. S. 4282) and is derived from the Act of Congress of March 3, 1851, c. 43, 9 Stat. 635. They also sought limitation of liability under Sec. 183, U. S. Code, Title 46, which section was also derived from the Act of March 3, 1851, c. 43, 9 Stat. 635, as amended. The text of this section, as it then read, is also printed in the appendix.*

Both Courts below sustained the contention of the respondents and granted them the relief prayed for under the Fire Statute.

Jurisdiction.

The jurisdiction of this Court over this case is based on Section 240 of the Judicial Code (28 U. S. Code, Sec. 347) and Article III, Section 2, of the Constitution:

The Facts.

The District Court made elaborate findings of fact (R. 1979-91), which were adopted by the Circuit Court of Appeals (R. 2049), and which contain all of the facts material to this application. The findings which need to be considered on this application may be summarized as follows:

On August 6, 1934, shortly before the S. S. "Venice Maru" reached Balboa, at the Pacific end of the Panama Canal, on her way from her loading ports in the Orient to U. S. Atlantic ports, fire broke out in her No. 1 lower hold, which hold was entirely filled with bags of sardine meal, a known hazardous cargo likely to catch fire from spontaneous combustion if not adequately ventilated (R. 1983-4; 2042). In consequence of this fire, the sardine meal and also the general cargo stowed in the upper and lower tween decks, which are immediately above lower hold

No. 1 where the sardine meal was stowed, were seriously damaged by fire or by water used to extinguish the fire.

The stowage of the sardine meal was improper (R. 1985; 1988; 1989; 2048-9). Because of such stowage and the danger of fire from the sardine meal, the "Venice Maru" was unseaworthy (R. 1988); and such improper stowage was the proximate cause of the fire (R. 1989; 2048-9). All the cargo, including the sardine meal, was in good condition when loaded and the meal was fit for carriage "from Kobe to New York if properly stowed and ventilated" (R. 1982; 1984; 2041).

Mr. Okiubo, Acting President and General Manager of the Carrier and its active head (R. 1986), knew that sardine meal was hazardous, likely to heat and to take fire by spontaneous combustion, and that a considerable part of the sardine meal would be stowed in the lower holds of the "Venice Maru" (R. 1986; 2045). Although there had been numerous shipments of sardine meal from Japan to the Pacific Coast of the United States, there had been no shipment of this commodity to Atlantic Coast ports by the Carrier before February 13, 1933, a little more than one year before the shipment on the "Venice Maru" (R. 2042). Before the shipment on the "Venice Maru", the "K" Line had had experience with overheating of fish meal cargoes on a number of its vessels which had carried the commodity on the long voyage from the Orient to U. S. Atlantic ports (R. 1984; 1986; 2042). In each of these cases the overheating had occurred after the vessels had left Los Angeles and while they were on their way via the Panama Canal from U. S. Pacific Coast ports to the U. S. Atlantic Coast ports (R. 1984). In two of these instances the "K" Line had used rice ventilators in an unsuccessful attempt to provide the requisite ventilation (R. 1984; 1986; 2042). Abundant circulation of air is necessary in stowage of sardine meal to prevent heating (R. 1985).

After its unfortunate experiences from overheating of sardine meal aboard its vessel used on the Japan-United

States Atlantic ports service, the "K" Line employed a Captain Fegen to supervise the stowage of sardine meal at Kobe (R. 2043). He, however, was not given authority to accept or reject sardine meal as cargo, or to decide what quantity could be carried safely, nor was he authorized to have anything whatever to do with any of the cargo other than the sardine meal (R. 1985-6; 2044). Fegen, who had had no actual experience in carrying sardine meal (R. 2043; 2045), had not been informed by the "K" Line of its own previous unsatisfactory experiences in carrying sardine meal (R. 2043); and he used rice ventilators to provide circulation of air for the exceptionally large quantity of sardine meal loaded on the "Venice Maru". In so doing, he merely followed the method which the "K" Line itself had used (R. 1983-4; 2045).

In 1935, after the fire on the "Venice Maru", "when it was realized that the experiments with rice ventilators proved unsatisfactory" (R. 1984), a method of stowage, known as "the block and channel method", came into general use as the proper means of providing sufficient ventilation for sardine meal (R. 1984). In 1934, as put by the Circuit Court of Appeals, "the stowage of such meal was still in flux; it was not till the next year that 'block and channel' stowage became the standard" (R. 2045; see also R. 2049). In short, before 1935, and at the time the sardine meal in suit was shipped, the proper method of stowing such a large quantity of sardine meal as that accepted by the "K" Line for carriage on the "Venice Maru", was still a matter of experimentation (R. 1984; see also R. 2045, 2049).

"The evidence does not establish any custom or usage in the carriage of fish meal from Japan to Atlantic Coast ports which justified the stowing of 665.5 tons of fish meal"—(the quantity of sardine meal in No. 1 hold of the "Venice Maru")—"with or without rice ventilators, in a substantially solid mass so as to almost fill a lower hold" (Finding 25, R. 1984-5). Such stowage of the sardine meal constituted a proximate cause of the fire (R. 1985;

1989). Even assuming that rice ventilators had been used in the manner claimed by the respondent carrier, the amount of ventilation provided for the meal was insufficient (R. 1985).

Both Courts exonerated the "K" Line and the ship because the carrier had employed Fegen to oversee the stowage of the sardine meal. They both held that Captain Fegen was not the Marine Superintendent, General Agent or Managing Officer of the "K" Line and that he was without power to control the movement of the ship or her crew, or to bind the "K" Line by contract (R. 1986-7, and 2044).

The Decision of the Circuit Court of Appeals.

The Circuit Court of Appeals expressly found that "although Okubo was not personally acquainted with what was necessary to protect the meal on such a long voyage, he had had ample notice that it was subject to heating" (R. 2045). It found further, that as heating can lead to fire, failure to prevent heating would be a cause of any resulting fire (R. 2045). It then said: "If therefore, in July, 1934, Okubo had taken no action the charterer might well have been liable" (R. 2045). Citing *Hines v. Butler*, 278 Fed. 877, 880 (C. C. A. 4); *Williams S. S. Co. v. Wilbur*, 9 Fed. (2d) 622 (C. C. A. 9); *Bank Line v. Porter*, 25 Fed. (2d) 843 (C. C. A. 4); *The Elizabeth Dantzler*, 263 Fed. 596. The Circuit Court of Appeals then held that the "K" Line had taken sufficient action by hiring Fegen to devise a proper method of stowage, and that, as the method of stowage adopted by Fegen was the cause of the fire, the carrier was protected by the Fire Statute (R. 2045), particularly since it found that "in July, 1934, it had not yet certainly appeared that, given properly made meal, such ventilators were not adequate to protect even such a large single block as half of", the quantity stowed in the No. 1 lower hold of the "Venice Maru".

In referring to the admitted failure of Okubo to tell Fegen of the earlier cargoes that heated, the Court held that this was not negligent, because it felt that Okubo was justified in assuming that Fegen would familiarize himself with the "K" Line's past experience, by inquiring of the "K" Line's masters (R. 2046). It then held further:

"Besides, even if it was negligent not to inform him, it does not appear that Fegen did not inform himself; or that, if he did not, his ignorance made any difference: *i.e.*, that his knowledge of the charterer's past experience would have led him to discard 'ice ventilators'. Since the claimants have the burden of proving 'neglect' under this statute—unlike the Limited Liability Statute—they must in any event fail upon this issue, for by no stretch can it be said that they proved that the fire was 'caused' by Fegen's ignorance of the charterer's past experience" (R. 2046).

As to the interest which Kawasaki Zosenjo sought to defend, the Circuit Court held that even though such liability was *in rem*, the Fire Statute was applicable to that liability (R. 2043).

Questions Involved and Reasons for Granting the Writ.

I. *Does the Fire Statute relieve the carrier from liability for damage by fire caused by stowage of a hazardous cargo on a general ship when there is no established, uniform or definite custom warranting the stowage of such cargo in the manner followed by the carrier and when, in fact, the method of stowage adopted was no more than an experiment?*

The Circuit Court of Appeals for the Ninth Circuit in the case of *Williams S. S. Co. v. Wilbur*, 9 F. (2d) 622, affirming 9 F. (2d) 940 (N. D. Cal.), cert. denied 271 U. S. 666, decided this question in the negative. So also did the Circuit Court of Appeals for the Fourth Circuit in

the case of *Bank Line v. Porter*, 25 F. (2d) 843. The Courts below, however, decided the question in the affirmative.

In the *Williams S. S. Co.* and the *Bank Line* cases, the carrier's duty on accepting goods for carriage and in handling them after they had been accepted is thus expressed:

"The law imposes upon owners of ships the duty of using due care to ascertain and consider the nature and characteristics of goods offered for shipment, and to exercise due care in their handling, including . . . such methods as their nature requires." [9 F. (2d) at 942; 25 F. (2d) at p. 845]

See also *The Nichiyo Maru*, 89 F. (2d) 539 (C. C. A. 4).

In the present case the "K" Line knew that sardine meal was a hazardous cargo, known to be likely to fire from spontaneous combustion (R. 2045) and known to require by its nature ample ventilation (Finding 26, R. 1985). Therefore, it was charged with the duty of exercising due care in handling the sardine meal and in adopting such methods as its nature required to prevent it from taking fire from spontaneous combustion, i. e., by giving it proper stowage and adequate ventilation.

As was naturally to be expected from the fact that Fegen had not been told of the trouble which the "K" Line had experienced, he adopted a method of ventilation for the "Venice Maru" cargo which was very similar to that which the "K" Line itself had used before it employed him (see p. 4, *supra*). The Circuit Court of Appeals, for the Second Circuit held that in spite of these circumstances, the Fire Statute protected the "K" Line since "in July, 1934 it had not yet certainly appeared that, given properly made meal," the method followed by Fegen was not adequate (R. 2045). Both Courts below had found that the sardine meal loaded on the "Venice Maru" was fit for transportation if properly stowed and ventilated

(R. 1982; 2641), which involved not stowing too great a quantity in lower holds; and that the proximate cause of the fire was the improper method of stowage adopted by Fegen in placing "665.6 tons of sardine meal in a substantially solid mass in No. 1 lower hold" (Conclusion 1, R. 1989; Findings, 27 and 28, R. 1985) and in relying on rice ventilators for circulation of air (R. 1985).

This holding is in square conflict with that of the Circuit Court of Appeals for the Ninth Circuit in *Williams S. S. Co. v. Wilbur*, 9 F. (2d) 622, where that Court, in denying the carrier the benefit of the Fire Statute, held:

"One of the witnesses testified that fish meal had been stowed on other vessels operated by the appellant in a very similar manner on several occasions, that it was the practice of the appellant to stow fish meal in that way, that he had seen the general agent at Baltimore on board while the stowage of fish meal was in progress, and that the agent saw and knew the manner in which such cargo was stowed. In addition to this, the appellant contends that the cargo now in question was stowed in the usual and customary manner. In the face of this testimony and this contention, it cannot be said that the owner was not responsible for the method of stowage adopted and followed, even though there is an absence of testimony tending to show that its managing officers or agents superintended the stowage of this particular cargo." (9 F. (2d) at p. 623.)

In short, the Ninth Circuit holds that when a subordinate follows an improper method of stowage previously adopted by a shipowner, such improper stowage is chargeable to the neglect of the shipowner personally, whereas the Second Circuit holds, under almost identical circumstances, that the shipowner is in no way chargeable with the results of such improper stowage.

We submit that on the findings in the present case the "K" Line was responsible although Okubo did delegate supervision of the stowage of the sardine meal

To Fegen and although there is an absence of testimony that Okubo superintended the stowage of the "Venice Maru", "Mr. Okubo was the Acting President and General Manager of the 'K' Line and its only officer actively participating in its business affairs and the operations of its vessels" (Finding 35, R. 1986). The meal was stowed at Kobe (Finding 5, R. 1981), where the main office of the "K" Line was located (Finding 2, R. 1979-80). In these circumstances, there was a "duty to act" (*Earle d' Stoddart v. Wilson Line*, 287 U. S. 420, footnote, p. 427); and as the contract of carriage was made at Kobe with the knowledge of Okubo (R. 1986), that duty was upon Okubo. The Court below holds that this duty was performed merely by employing Fegen, whereas in the *Williams S. S. Co.* case the Circuit Court of Appeals for the Ninth Circuit holds that where the stowage was in the usual manner (or as the Circuit Court of Appeals for the Second Circuit put it in this case, the accepted way of protecting heating cargoes), then the negligence is that of the carrier personally and the absence of evidence as to actual knowledge of the stowage of a particular shipment is immaterial. This is especially so when this is all done at the vessel's home port with the approval of the managing officer of the carrier which is the situation here. In other words, the acceptance of a hazardous cargo for carriage, when there is no certain way of carrying it safely in large quantities, is the personal neglect of the carrier. This conflict between these cases, unless resolved by a decision of this Court, will leave our maritime law on this important question in a state of uncertainty and confusion.

The conflict of the decision below with *Bank Line v. Porter*, 25 F. (2d) 843 (C. C. A. 4), cert. denied 278 U. S. 623, where the Circuit Court of Appeals for the Fourth Circuit denied the benefit of the Fire Statute to a carrier who had knowledge of "a condition involving danger of fire" (25 F. (2d) at p. 845), also confuses the

law on this important question. In that case the Court said:

"In this case, as in the case of *The Elizabeth Dantzer*, 263 F. 596, we are of the opinion that, taking into consideration the nature of the cargo and climatic conditions at Ponta Delgada, the fire was reasonably to be feared and provided against, if not to be expected. All these facts were in possession of the owners of the 'Pelerie'; their agents were on the ground, and no steps taken to prevent the fire. Knowledge of facts that may be reasonably expected to lead to certain results imposes a direct liability for those results. *The Eastern Gladys* (C. C. A.), 13 F. (2d) 555; *Willfaro-Willsolo* (D. C.), 9 F. (2d) 940." (25 F. (2d) 845).

To the same effect is *Hines v. Butler*, 278 Fed. 877 (C. C. A. 4), cert. denied 257 U. S. 659, which is also in conflict with the decision below.

On this question the decision below is also in conflict with the English law. In *Lennard's Carrying Co., Ltd. v. Asiatic Petroleum Co., Ltd.*, (1915) A. C. 705, affirming (1914) 1 K. B. 419 (C. A.), the House of Lords held that where a managing director of a company knew, or had means of knowing, a condition of a vessel which rendered her unseaworthy and gave no instructions as to such condition, the neglect was the personal neglect of the ship-owner and deprived it of the benefits of the Fire Statute. In the Court of Appeals in that case, Hamilton, L. J. (afterwards Lord Sumner), whose judgment was mentioned with approval in the House of Lords, said:

"I recall that with proper diligence the owners might have prevented all this and must have known the special perils attending the transport of benzine in bulk, for it was their trade. When these owners asked this Court to find that the fire, which naturally ensued in the circumstances, 'happened without their actual fault or privity', I refuse." [(1914) 1 K. B. at p. 441].

It is desirable that the law of England and the law of the United States be in harmony on this important question of the maritime law. *Queen Insurace Co. v. Globe & Rutger's Fire Ins. Co.*, 263 U. S. 487, 493; *Aetna Ins. Co. v. United Fruit Co.*, 304 U. S. 430, 434.

III. *Does the Fire Statute exonerate a carrier from liability for loss or damage to goods carried by it when the carrier delegates its obligation as to the stowage of a commodity, which it knows to be hazardous and likely to catch fire from spontaneous combustion and which forms a large part of the ship's cargo, to a surveyor, without informing the surveyor of its unsatisfactory experience in stowing and carrying such hazardous commodity in a new trade?*

The Court below answered that question in the affirmative. The Circuit Court of Appeals for the Fourth Circuit in *Bank Line v. Porter*, 25 F. (2d) 843, cert. denied 278 U. S. 623, answered it in the negative.

The Courts below found that Mr. Okubo did not inform Captain Fegen, nor instruct any one else to inform him, of the experience with overheating which the "K" Line had had in the carriage of sardine meal and of the failure of the "K" Line's prior methods of stowage, including the use of rice ventilators, to prevent heating (R. 1987; 2043). Nevertheless, they held that such failure was immaterial because they assumed, without any evidence on the point, that Fegen could have ascertained that experience by inquiry of other masters of the "K" Line (R. 1987; 2046).

In *Bank Line v. Porter*, 25 F. (2d) 843, a fire occurred in a cargo of jute on board the S. S. "Pelerie" from spontaneous combustion, due to the delay of the vessel at Ponta Delgada awaiting repairs following her breakdown on her voyage from Calcutta to New York. The breakdown and delay were caused by the vessel's unseaworthy

condition at Calcutta at the inception of the voyage. The shipowner contended that the unseaworthiness was not due to its neglect, but to the neglect of a Lloyd's surveyor whom it had employed at Calcutta to make the vessel seaworthy. Upon it appearing that the shipowner had failed to inform the surveyor of previous difficulties with the vessel, the Circuit Court of Appeals for the Fourth Circuit indulged in no assumptions as to whether the surveyor could have secured from other sources, such as the vessel's officers and log books, information respecting the vessel's prior difficulties, but held that the owner's failure to furnish such information constituted neglect on its part which barred the owner from the benefits of the Fire Statute (25 F. (2d) at p. 845).

The House of Lords has also held that a shipowner's failure to furnish to a party to whom he has delegated the responsibility of maintaining his vessel in a safe and seaworthy condition facts within his knowledge affecting her safety constitutes his personal neglect. *The Schwan*, (1909) A. C. 450; *Leonard's Carrying Co., Ltd. v. Asiatic Petroleum Co., Ltd.*, (1915) A. C. 705. It is no excuse that the employee might be able to ascertain such facts from other sources. *Standard Oil Co. v. Clan Line Steamer*, (1923) A. C. 400, where Lord Parmoor said at pp. 130-131:

"The fact that the captain of a vessel may find out for himself, after a certain period of time, a source of unusual danger, which was within the knowledge of the shipowners, and might have been communicated directly to him in the first instance, is not sufficient to justify the shipowners in subjecting a cargo to the risk of loss, or to exempt them from liability for not exercising due diligence if such a loss has been incurred."

The contrary ruling of the Second Circuit in the case at bar should be reviewed to the end that harmony be restored, not only between the different Circuits in this

country, but also with the House of Lords on this important point. The Hague Rules, which are incorporated into both the American and British Carriage of Goods by Sea Acts,* contain in subdivision 2 (b) of Article 4 an exemption against liability for loss from "fire unless caused by the actual fault or privity of the carrier" (46 U. S. Code, Section 1304). The language of these Rules is identical in England and the United States and if they are to receive a different interpretation in the two countries, many years of painstaking work by commercial men, to arrive at uniformity in the law of carriers will have gone for naught.

It thus appears that there is a clear cut conflict between the Second Circuit on the one hand and the Fourth Circuit and the House of Lords on the other hand as to what constitutes "neglect" within the meaning of the Fire Statute.

III. Is it sufficient for a carrier, in order to obtain the benefit of the Fire Statute, to show merely that there was a fire and no more? Or must the carrier bring itself within the full terms of the Statute in order to obtain its benefits, i. e., show that the fire occurred without its neglect?

The Circuit Court of Appeals for the Second Circuit holds that cargo owners "have the burden of proving 'neglect' under this statute, unlike the Limited Liability Statute . . ." (R. 2046). It does not state why it is sufficient for a shipowner seeking the protection of Section 1 of the Act of March 3, 1851, to bring itself partially within the terms of that Section, although, to obtain the protection of Section 3 of the same Act, it must bring itself wholly within the terms of the latter Section [see *The Silver Palm*, 94 F. (2d) 776, 777 (C. C. A. 9), where the authorities on the burden of proof under Section 3 are collected]. The Court below merely cited in support of this dis-

* The American Act (46 U. S. Code, Sec. 1300 *et seq.*) was not passed until April 17, 1936, or nearly two years after the voyage in question. The British Act (14 and 15 Geo. V, C. 22) was adopted in 1924 and is in all material respects identical with the American Act.

ermination the District Court's ruling in *The Strathdon*, 89 F. 374, 378 (E. D. N. Y.) and its own rulings in *The Salvore*, 60 F. (2d) 683; and *The Older*, 65 F. (2d) 359. In the last of these cases it gave the following reason to support the holding:

"The situation is like any other where the claimant brings himself within an exemption, in which event the libelant must prove that he has been negligent." (65 F. (2d) at p. 360).

The fallacy in this reasoning is that the carrier does not bring itself within the exemption specified in the Fire Statute by the mere showing of fire. The holding below ignores the fact that the release from liability by its terms is subject to a qualifying clause. This was pointed out by this Court in *Walker v. Transportation Co.*; 3 Wall. 150, 153, where this Court said:

"By the language of the first section the owners are released from liability for loss by fire in all cases not coming within the exception there made." (3 Wall. at p. 153).

This Court in *Earle & Stoddart v. Wilson Line*, 287 U. S. 420, made a similar observation. There it said:

"The fire statute, in terms, relieves the owners from liability 'unless such fire is caused by the design or neglect of such owner'." (287 U. S. at p. 425.)

Thus proof of a loss caused by a fire which may or may not have been caused by shipowner's design or neglect, does not establish a shipowner's right to the exemption. To obtain the benefit of the exemption, the shipowner must show that the fire happened without any neglect on its part. This Court so said in *Providence, etc. Co. v. Hill Manufacturing Co.*, 109 U. S. 578:

"They [the shipowners] may not be able, under the first section [the fire provision is Sec. 1 of the Act of March 3, 1851, now 46 U. S. C. § 182] to show that it happened without any neglect on their part, or

what a jury may hold to be neglect; whilst they may be very confident of showing, under the third section [the limitation of liability provision is Sec. 3 of the Act of March 3, 1851, now 46 U. S. C. § 183], that it happened without their privity or knowledge." (109 U. S. at p. 602.)

The English Courts have taken the same view. In *Leinard's Carrying Co., Ltd., v. Asiatic Petroleum Co., Ltd.*, (1915) A. C. 705, Lord Dupedain in the House of Lords said at pp. 715-716:

"But, my Lords, I think the true criterion of the case is that which was found and applied by Hamilton, L. J., that the parties who plead this 502nd section* must bring themselves within its terms; and therefore the question is, have the company freed themselves by showing that this arose without their actual fault or privity? I think they have not."

See also particularly *Ingram & Royle, Ltd., v. Services Maritimes du Treport*, (1914) 1 K. B. 541, 559 (C. A.).

The present decision is in conflict with *Bank Line v. Porter*, 25 F. (2d) 843, cert. denied 278 U. S. 623, on this question also. After referring to Mr. Okubo's admitted failure to inform Captain Fegen of the "K" Line's bad experience in the carriage of sardine meal, the Circuit Court of Appeals here said:

"Besides, even if it was negligent not to inform him, it does not appear that Fegen did not inform himself; or that, if he did not, his ignorance made any difference: i. e., that his knowledge of the charterer's past experience would have led him to discard 'rice ventilators.' Since the claimants have the burden of proving 'neglect' under this statute—unlike the Limited Liability Statute—they must in any event fail.

* Section 502 of the Merchant Shipping Act, 1894, Part VIII, provides: "The owner of a British seagoing ship, or any share therein, shall not be liable to make good to any extent whatever any loss or damage happening without his actual fault or privity in the following cases, namely: (1) Where any goods, merchandise, or other thing whatsoever taken in or put on board his ship are lost or damaged by reason of fire on board the ship."

upon this issue, for by no stretch can it be said that they proved that the fire was 'caused' by Fegen's ignorance of the charterer's past experience. *The Strathdon*, 89 Fed. Rep. 378; *The Salvore*, 60 Fed. (2) 683 (C. C. A.; 2); *The Older*, 65 Fed. (2) 359 (C. C. A. 2)."
(R., 2046). (Italics ours.)

The Circuit Court of Appeals for the Fourth Circuit in *Bank Line v. Porter*, 25 F. (2d) 843, cert. denied 278 U. S. 623, placed no similar burden on cargo in that case when cargo proved the shipowner's failure to inform the surveyor at Calcutta (whom he had employed to see to it that the "Polieie" was seaworthy on sailing from Calcutta) of the S. S. "Polieic's" history on her voyage from Greenock to Calcutta.

Furthermore, this Court has never held that a ship-owner's neglect must be shown to be the direct cause of the fire; it would appear sufficient to bar the benefits of the statute if such neglect merely contributed to it. *Walker v. Transportation Co.*, 3 Wall. 150, at p. 153, where this Court said:

"It is quite evident that the statute intended to modify the ship-owner's common-law liability for everything but the act of God and the King's enemies. We think that it goes so far as to relieve the ship-owner from liability for loss by fire, to which he has not contributed either by his own design or neglect".

See also *Earle & Stoddart v. Wilson Line*, 287 U. S. 420 at p. 424.

IV. If a mere showing of loss by fire is sufficient to throw the burden of proof of negligence on the owner of cargo, is not this burden sustained by showing that the shipowner knowingly received for carriage on a general ship a large quantity of a cargo which he knew involved an abnormal fire hazard and the transportation of which the shipowner knew was still in the experimental stages?

That the foregoing question should be answered in the affirmative would seem to be almost self-evident, and it has been so answered wherever it has arisen outside of the Second Circuit. Specifically, an affirmative answer is required under the decisions in the Fourth and Ninth Circuits and in England (see cases cited *supra*, pp. 15-17). In the Second Circuit, however, this question has been answered in the negative in this case. As appears from the findings, the cargo owners in this case fully sustained the burden as above set forth; yet the Circuit Court of Appeals held that this was not enough because—

"In July, 1934, it had not yet *certainly* appeared that, given properly made meal, such ventilators were not adequate to protect even such a large single block as half of 665 tons" (R. 2045). (Italics ours.)

From the foregoing, it appears that in the Second Circuit it is not enough to show that the shipowner knowingly carried a cargo which created a serious danger of fire; but that the cargo owner must prove that there was a *certainity* of fire. Thus, of course, is an impossible burden and amounts, in effect, to repealing the qualification on the exemption given by the Fire Statute, i. e., the qualification: "unless such fire is caused by the design or neglect of such owner." In this Circuit, for all practical purposes, the exemption in case of fire is now absolute and unqualified.

As to the Liability of the Ship.

V. Does the Fire Statute extinguish maritime liens for cargo damage or is its operation confined to *in personam* liability only?

The Circuit Court of Appeals for the Second Circuit answers this question in the affirmative; and it expressly concedes that its decision in this respect is in conflict with that of the Circuit Court of Appeals for the Fifth Circuit

in *The Etua Maru*, 33 F. (2d) 232, cert. denied 280 U. S. 603 (R. 2043). It refers to that case as having been partially disapproved in *Earle & Stoddart v. Wilson Line*, 287 U. S. at p. 427, footnote. It is true that in so far as *The Etua Maru* decision held that the owner of an unseaworthy vessel could not claim the benefit of the Fire Statute, even though the unseaworthiness was unknown to her owner, the decision was there disapproved; but this Court has never disapproved the decision in that case that in those circumstances the ship may continue to be liable *in rem*, although the owner may not be liable *in personam*.

The reasons given by the Court below in support of its position on this question are in square conflict with numerous decisions of this Court (see annexed brief at pp. 40-44) and also with Section 486 of 46 U. S. Code where the statute in its very terms preserves an *in rem* liability when there is no *in personam* liability (see annexed brief at p. 42).

Importance of the Questions Involved.

If this decision, which appears to be based upon a misinterpretation of this Court's ruling in *Earle & Stoddart v. Wilson Line, supra*, is permitted to stand, it will constitute an invitation to all carriers to accept dangerous goods for carriage on a general ship, although there is no certain way whereby they can be carried in safety. The ensuing dangers are emphasized by the fact that under the decision below, the burden is placed upon the cargo owner of producing evidence to show specific acts of personal negligence on the part of the owner, whereas all the evidence is in the owner's hands. As we shall point out in the brief submitted herewith, the present ruling as to the burden of proof under the Fire Statute is not an isolated decision, but represents the settled law of the Second Circuit. Until this Court grants a review in a case of this type in the Second Circuit, the Fire Statute will have an entirely different effect in that Circuit from that given to it in

the other Circuits and in England. Also, what must be proved by a carrier to obtain the benefit of the exemption will differ in the various Circuits. In view of the all too numerous fires at sea, and the international character of such incidents, which usually involve property of many different nationals, the importance of uniform interpretation of the statute is obvious.

WHEREFORE, petitioners pray that this Court issue a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit, directing it to send to this Court for review, a full transcript of the record in the said Circuit Court of Appeals in the case entitled "In the Matter of The Petition of Kabushiki Kaisha Kawasaki Zosenjo, Owner, and Kawasaki Kisen Kabushiki Kaisha, Bareboat Charterer of the Steamship 'Venice Maru', for exoneration from and limitation of liability", No. 120, October Term 1942, United States Circuit Court of Appeals for the Second Circuit, and that the decision of the Circuit Court of Appeals for the Second Circuit, dated January 25, 1943, and the decree of the District Court, entered on the 29th day of July, 1941, be reversed, and for such other relief in the premises as may be just.

Dated, New York, N. Y., March 31, 1943.

CONSUMERS IMPORT CO., INC.,
and other Cargo Claimants,
Petitioners.

By D. ROGER ENGLAR,
T. CATESBY JONES,
EZRA G. BENEDICT FOX,
THOMAS H. MIDDLETON,
Proctors for Petitioners.

IN THE
Supreme Court of the United States
OCTOBER TERM, 1942.

No.

In the Matter
 of the

Petition of KABUSHIKI KAISHA KAWASAKI ZOSENJO, Owner,
 and KAWASAKI KISEN KABUSHIKI KAISHA, Bareboat
 Charterer of the steamship "VENICE MARU", for Exon-
 eration from and Limitation of Liability.

CONSUMERS IMPORT CO., INC., *et al.*,
Cargo Claimants-Petitioners,

KABUSHIKI KAISHA KAWASAKI ZOSENJO and KAWASAKI
 KISEN KABUSHIKI KAISHA,

Respondents.

**BRIEF IN SUPPORT OF PETITION FOR
 WRIT OF CERTIORARI.**

Opinions Below.

The opinion of the District Court (R. 1971-79) is officially reported in 39 Fed. Supp. 349. The District Court's Findings of Fact and Conclusions of Law are printed at pages 1979-1991 of the record. The District Court decree appears at pages 1999-2005 of the record.

The opinion of the Circuit Court of Appeals, filed January 25, 1943, has not yet been officially reported, but is printed at pages 2040-2049 of the record. The order for mandate, dated February 18, 1943, affirming the District Court decree, is printed at pages 2049-2050 of the record.

Jurisdiction of This Court.

The jurisdiction of this Court is founded on Section 240 of the Judicial Code, as amended, (28 U. S. C. Sec. 347) and Article III, Section 2, of the Constitution of the United States.

The Facts.

The facts are stated in the petition and will not be repeated here.

POINT I.

The Fire Statute does not relieve a carrier from liability for damage by fire caused by the stowage of a hazardous cargo on a general ship when there is no established, uniform or definite custom warranting the stowage of such cargo in the manner used by the carrier, and when, in fact, the method of stowage adopted was no more than an experiment.

All the damage to the hundreds of shipments of general cargo on the "Venice Maru" was due to fire (or water used to extinguish the fire) caused by spontaneous combustion among bags of sardine meal stowed in a substantially solid mass in the vessel's No. 1 Lower Hold. It has also been found that such stowage was improper (Findings 27, R. 1985, and 49, R. 1988), was not justified by any custom or usage (Finding 25, R. 1984-5), and was the proximate cause of the fire (Finding 28, R. 1985; Conclusion 1, R. 1989).

The "K" Line was a common carrier. Consequently, its situation as such implied skill in the carriage of goods accepted by it for transportation. This Court as early as *Steamboat New World v. King*, 16 How. 469, said (p. 475):

"In the first place, it is settled, that 'the bailee must proportion his care to the injury or loss which is likely to be sustained by any improvidence on his part'. Story, *Bailm.* See, 15.

It is also settled that if the occupation or employment be one requiring skill, the failure to exert that needful skill, either because it is not possessed, or from inattention, is gross negligence. Thus Heath, J., in *Shields v. Blackburne*, 1 H. Bl. 161, says, 'If a man applies to a surgeon to attend him in a disorder for a reward, and the surgeon treats him improperly, there is gross negligence, and the surgeon is liable to an action; the surgeon would also be liable for such negligence if he undertook gratis to attend a sick person, because his situation implies skill in surgery.' And Lord Loughborough declares that an omission to use skill is gross negligence." (Italics ours.)

See also *Preston v. Prather*, 137 U. S. 604, 610, 611; *Hannibal R. R. v. Swift*, 12 Wall. 262, 273.

The foregoing obligation is emphasized in this case by the fact that the cargo which was improperly stowed, consisted of a commodity "recognized as an hazardous cargo subject to heating and to spontaneous combustion" (Finding 20, R. 1983) if not stowed in small lots and given adequate ventilation. The "K" Line undertook, however, to carry 38,000 bags or 1,900 tons of such cargo on the "Venice Maru" and thereby increased the ordinary hazard of the voyage. In *The Isis*, 290 U. S. 333, 348, Mr. Justice Cardozo, writing for this Court, pointed out that a carrier has no right to increase in any way the ordinary risks of transportation, but that if he chooses for his own purposes to send out a ship with needless enlargement of the ordinary risks, he should "not receive

exemption at the cost of the owners of the cargo if the perils thus enlarged have brought about the loss.

The Courts below have found that the nature of sardine meal calls for special skill in its handling in order to avoid any overheating (Finding 26, R. 1985); that "the stowage of sardine meal was still in flux" (R. 2045, 2049) at the time this shipment was made; and that the required skill for the carriage of the large quantity which the "K" Line undertook to carry on the "Venice Maru" was not developed until 1935, the year after this shipment (Finding 24, R. 1984; see also R. 2045, 2049). Mr. Okubo, the active head of the "K" Line (R. 1986, 2043), "had had ample notice that it was subject to heating" (R. 2045). The Circuit Court of Appeals has also pointed out that "Okubo was not personally acquainted with what was necessary to protect the meal on such a long voyage" (R. 2045) as the one in question from Kobe to United States Atlantic ports. In fact, the "K" Line had already "experienced trouble from overheating of sardine meal on five of its vessels" in that trade (Finding 22, R. 1984). In short, the "K" Line, when it accepted these 38,000 bags or 1,900 tons of sardine meal for carriage on the "Venice Maru", was not possessed of the needful skill for the safe carriage of this exceptionally large quantity and did not know how "to exercise due care in their handling, including * * * such methods as their nature require". *Bunk Line v. Porter*, 25 F. (2d) 843, 845 (C. C. A. 4); *The Nichijo Maru*, 89 F. (2d) 539, 542 (C. C. A. 4); *The Ferncliff*, 22 F. Supp. 728, 735 (D. C. Md., Chesnut, J.).

Thus, the "K" Line's fundamental breach of duty consisted in accepting for carriage on the "Venice Maru" an exceptionally large quantity of a commodity "recognized as an hazardous cargo subject to heating and to spontaneous combustion" (Finding 20, R. 1983-4) at a time when there was no approved method of carrying such a quantity in safety. This breach of duty was aggravated by stowing

this hazardous cargo on a general ship together with hundreds of other shipments such as silk, matches, porcelain goods, etc.

The Circuit Court of Appeals held, however, that the "K" Line, even under the foregoing circumstances, was entitled to the exemption afforded by the Fire Statute because, after its own failures in devising a proper method of safely carrying sardine meal on the long voyage from Kobe to United States Atlantic ports, it had employed a Lloyd's Surveyor, one Captain Fegen, to supervise the stowage of sardine meal on its vessels at Kobe. It is not shown that Fegen possessed any unusual qualifications in respect of stowing sardine meal. In fact, it affirmatively appears that "he had had no actual sea experience with sardine meal or apparently with other fish meal" (R. 2045). It also affirmatively appears that "the first ship which he stowed was the 'Getsuyo Maru,'" a "K" Line ship (R. 2043), and that its cargo of sardine meal overheated (R. 2042). The "Venice Maru" was the second "K" Line vessel to come under his supervision. The method employed by him in stowing the sardine meal was not justified by any custom or usage (Finding 25, R. 1984-5) and has been found to be inadequate and unsafe (Findings 27, R. 1985, and 49, R. 1988). His attempt to afford the sardine meal the full ventilation which its nature requires (Finding 26, R. 1985), consisted of the use of rice ventilators (R. 2041-2) which "had for long been an accepted way of ventilating other heating cargoes" (R. 2045). This method had also been used by the "K" Line on two of its earlier ships and had failed to prevent overheating of their sardine meal cargoes (Findings 22, R. 1985, and 34, R. 1986). The District Court specifically found that the effect of the use of rice ventilators in sardine meal at the time in question "was unknown, uncertain and speculative" (Finding 23, R. 1984) and constituted an experiment (Finding 24, R. 1984).

In ruling that the mere employment of Fegen constituted a complete fulfilment of the "K" Line's personal

obligations as a common carrier and entitled it to the exemption of the Fire Statute in respect of the damage resulting from the stowage of a hazardous commodity in an improper and experimental manner, the lower Courts rely on their interpretation of the doctrine laid down by this Court in *Earle & Stoddart v. Wilson Line*, 287 U. S. 420.

In that case (287 U. S. at p. 424) this Court pointed out that "the immediate cause of the loss was the fire", which broke out at sea in the temporary bunkers and (p. 424) "the immediate cause of the fire was the condition of the coal at the time the voyage commenced which rendered the vessel unseaworthy". It was also there specifically found that (p. 424) "no design or neglect of the owner contributed" to the cause of the fire, but that (p. 424) "the sole cause of the unseaworthiness was the gross neglect of the ship's chief engineer in putting a new supply of coal on top of old coal then known to be heated". Under these findings, this Court held that the British shipowner was entitled to the exemption from liability granted by the Fire Statute since (p. 426) "the breach of the implied warranty of seaworthiness", standing alone, was not sufficient to constitute "neglect" of the vessel-owner under the fire statute". In the footnote on page 427, this Court recognized that there were duties which the law imposed upon shipowners and that "in all cases where immunity from liability for damage by fire was held to be lost because of neglect of the owners, the courts have based their finding of neglect on the action of the owners or managing agents, or upon their failure to see that action was taken where it was their duty to act" (p. 427). Several of the cases thus referred to and cited by this Court in that footnote are the cases upon which we rely in the petition as being in conflict with the ruling in the case at bar. We submit that it is clear that this Court's ruling in the *Earle & Stoddart* case was not intended in any way to modify those decisions.

The facts in the instant case clearly establish a duty on the part of the carrier itself. Such duty consisted of its being able to exercise due care in the handling of a hazardous commodity "including . . . such methods as their nature require" (*Bank Line v. Porter*, 25 F. (2d) 843, at p. 845) and in possessing the requisite skill required of it when it accepted the hazardous commodity for transportation on a general ship. The carrier's liability here is not based merely on failure to exercise due diligence in making its vessel seaworthy, but rests upon the fundamental breach committed by it in attempting to carry a hazardous commodity on a general ship when it did not know how to do so with safety. It has already been pointed out that Okubo, its active head, "had had ample notice" that sardine meal was subject to overheating (R. 2045) and personally knew of the failure of rice ventilators to prevent overheating in sardine meal on two other "K" Line ships.* Since Mr. Okubo thus had personal knowledge of the failure of the "K" Line's own attempts to devise a safe method of stowage and ventilation for large lots and since he "knew sardine meal constituted a considerable portion of the cargo of the 'Venice Maru' and that some part of the large shipment of such meal might be stowed in a lower hold" (Finding 37, R. 1986), the "K" Line had actual knowledge "of a condition involving a danger of fire" existent on the "Venice Maru", whereas in the *Earle & Stoddart* case the British ship-owner had no personal knowledge of the fire hazard existing on board its ship on sailing from New York.

The established facts clearly distinguish this case from *Earle & Stoddart v. Wilson Line, supra*, since delegating

* These are two of the vessels involved in the so-called *Wellman* cases reported under the heading of *The Nibijo Maru*, 14 F. Supp. 727, affirmed 89 F. (2d) 539 (C. C. A. 4th). The District Court there rejected the "K" Line's contention that that meal had been improperly manufactured and specifically found that it was in good condition when shipped and that there was "no explanation from the evidence of the cause of damage other than inadequate ventilation" (14 F. Supp. at p. 733).

to a surveyor the stowage of a cargo which was known to be dangerous and which no one knew how to stow safely, is obviously an entirely different matter from leaving to a ship's engineer the routine duty of looking after her bunkers in a foreign port. The application and extension of the doctrine in the *Earle & Stoddart* decision to the case at bar ignores the duty of a carrier not to accept for carriage a large quantity of goods, which it knows to be likely to catch fire from spontaneous combustion, when at the time of shipment the art of carrying such commodity has not reached the stage where a safe method of carriage of such a large quantity has been ascertained, i. e., at a time when the care and skill required to carry such cargo safely is still a matter of experiment.

The decision in the case at bar means that a carrier with full knowledge of the dangers of fire inherent in its action may turn over the conduct of an experiment as to whether the engagement of the carrier may be performed to a third party and thereby avoid the consequences flowing from the failure of the experiment.

As we have shown in the petition, such an extension of the doctrine of the *Earle & Stoddart* to this case renders the decision below in square conflict with the ruling of the Circuit Court of Appeals for the Ninth Circuit in *Williams Steamship Company v. Wilbur*, 9 F. (2d) 622, and of the Circuit Court of Appeals for the Fourth Circuit in *Bank Line v. Porter*, 25 F. (2d) 843, as to the application of the American Fire Statute, and the ruling of the House of Lords in *Lennards Carrying Co., Ltd. v. Asiatic Petroleum Co., Ltd.*, (1915) A. C. 705, as to the analogous British Fire Statute. Those decisions have been discussed at pages 7-11 of the petition.

In summary, we submit that the attempted extension by the courts below of the doctrine of the *Earle & Stoddart* case should be reviewed by this Court because it is in

conflict with the settled rule in other Circuits and also because such extension is wrong in principle and will relax the vigilance to which common carriers by sea should be held, in respect of safeguarding against fires.

POINT II.

The Fire Statute does not exonerate a carrier from liability for loss or damage to goods carried by it when the carrier delegates to a surveyor its obligation as to the stowage of a commodity, which it knows to be hazardous and likely to catch fire from spontaneous combustion and which forms a part of the ship's cargo, without informing the surveyor of its unsatisfactory experience in stowing and carrying such hazardous commodity.

Mr. Okubo, the Acting President and General Manager of the "K" Line (R. 1986), and Mr. Kitamura, his Chief Assistant (R. 618), testified as to heating of sardine meal on five of its ships and of the failure of the "K" Line to devise a proper method of adequately ventilating sardine meal cargoes in the comparatively new trade from Kobe to U. S. Atlantic Coast ports. It was after such heatings that Mr. Okubo made Captain Fegen "the sole person from shore at Kobe charged with the duty by 'K' Line of seeing to safe stowage of sardine meal on the 'Venice Maru'" (R. 1985).

If is admitted that Mr. Okubo did not advise Captain Fegen, nor instruct anyone else to advise Captain Fegen, of the failure of the methods of stowage used by the "K" Line ships to avoid the dangers of overheating. On two out of the five ships on which there had been overheating of sardine meal cargoes, the "K" Line had used rice ventilators to provide the sardine meal with the requisite circulation of air; but it was found that nevertheless the cargoes heated. This fact also had not been communicated to Captain Fegen.

Under such circumstances, it is not surprising that Captain Fegen, in stowing the sardine meal on the "Venice Maru", also used rice ventilators (R. 2041, 2042), which "had for long been an accepted way of ventilating other heating cargoes" (R. 2045), particularly since at the time in question, "the stowage of sardine meal was still in flux" (R. 2045). In short, Captain Fegen, not having been warned of the failure of such a method of stowage in respect of sardine meal, repeated on the "Venice Maru" the same experiment which had failed on two earlier "K" Line ships, which failures had led to his employment.

The Circuit Court of Appeals, however, ruled that Okubo's omission to advise Fegen as to the failure of the "K" Line's prior experiments with rice ventilators did not constitute neglect sufficient to deprive the carrier of the benefits of the Fire Statute. We have shown in the petition (pp. 12-13) that the decision of the Second Circuit on this question is in square conflict with that of the Circuit Court of Appeals for the Fourth Circuit in *Bank Line v. Porter*, 25 F. (2d) 843. We shall not here restate the discussion in that respect.

The House of Lords has held^{*} that a carrier owes a personal duty to the owners of cargo carried on its vessel to convey to a person to whom it has delegated the responsibility of maintaining such vessel in a safe and seaworthy condition facts within the carrier's own knowledge affecting her safety. *Standard Oil Co. v. Clan Line Steamers*, (1924) A. C. 100. Lord Atkinson stated the basis of the decision as follows (at p. 123):

"I think that the respondents by leaving the captain of the 'Clan Gordon' in ignorance of these instructions, by failing to bring them to his notice so that he would grasp and understand them, failed to discharge the duty they owed to the shippers of the cargo the vessel carried, and failed to use due diligence to make their ship seaworthy."

To like effect was the ruling in *The Schwan*, (1909) A. C. 450 (H. L.), and in *Lennards Carrying Co., Ltd., v. Asiatic Petroleum Co., Ltd.*, (1915) A. C. 705 (H. L.).

We submit that the contrary ruling of the Second Circuit in the case at bar should be reviewed to the end that harmony be restored, not only between the different Circuits in this country, but also with the House of Lords on this important point.

POINT III.

A carrier to obtain the exemption afforded by the Fire Statute must bring the cause of the losses fully within the terms of the statute.

By its terms, the Fire Statute (originally Section 1 of the Act of March 3, 1851, now 46 U. S. Code, Sec. 182,*) grants to a shipowner only a conditional exemption from liability for a loss caused by fire on board ship. If the "fire is caused by the design or neglect of such owner", then there is no exemption;

The only authorities cited by the Circuit Court of Appeals for the Second Circuit in support of its ruling that mere proof of a fire by a shipowner brings the case within the exemption of liability granted by the Fire Statute are *The Strathdon*, 89 Fed. 374 (E. D. N. Y.), a district court case; and two of its own decisions, *The Salvore*, 60 F. (2d) 683, and *The Older*, 65 F. (2d) 359. The ruling of these cases is in conflict with the other authorities and is also clearly wrong in principle. We shall not repeat what has been said in the petition on this

* The text is printed in the appendix to the petition. Since the carrier in this case, the "K" Line, was the bareboat charterer of the "Venice Maru" (R. 1980), it is deemed under the provisions of 46 U. S. Code Sec. 186 a shipowner within the meaning of the Fire Statute.

subject; but it may be helpful to give a more detailed statement of what this Court said in *Providence & N. Y. S. S. Co. v. Hill Mfg. Co.*, 109 U. S. 578, at p. 602:

"Fire, except when produced by lightning, not being regarded in the commercial law as the act of God, ship owners, as common carriers, were held liable for any loss or damage caused thereby. The first section of the act of 1851 was no doubt intended to change this rule. It was copied (all except the last clause) from the second section of 26 George III, ch. 86, passed in 1786. The last clause of the section, excepting from its operation cases in which the fire is caused 'by the design or neglect' of the owners, was probably implied in the English statute without being expressed, as in ours. In all cases of loss by fire, not falling within the exception, the exemption from liability is total. But there is no inconsistency or repugnancy in allowing a partial exemption in cases falling within the third section; that is, cases of loss by fire happening without the *privity or knowledge* of the owners. *They may not be able, under the first section, to show that it happened without any neglect on their part, or what a jury may hold, to be neglect;* whilst they may be very confident of showing, under the third section, that it happened without their privity or knowledge. The conditions of proof, in order to avoid a total or a partial liability under the respective sections, are very different."

It is true the owners of a ship may desire to contest all liability whatever, as well as to establish a limited liability if *they fail in the first defence;* and this they may do, as well in cases of loss by fire as in other cases, in one and the same proceeding. And we see no repugnancy between the two defences. One is a more perfect defence than the other, and requires a different class or degree of proofs. That is all." (109 U. S. at p. 602) (Italics ours.)

Section 3 of the Act of March 3, 1851, is now known as the Limitation Statute (46 U. S. Code, Sec. 183). The Circuit Court of Appeals for the Second Circuit admits

that the shipowner, to secure the partial exemption granted by that section, must bring itself fully within the qualifying terms thereof.* That Court earlier in *The Republic*, 61 Fed. 109, 112-3, treated the Limitation Statute as a partial exemption granted to the shipowner by statute. We submit that it offers no adequate reason why a carrier should not also bring itself fully within Section 1 to obtain the total exemption granted by it.

In *Quinlan v. Pew*, 56 Fed. 111; 115-116, the Circuit Court of Appeals for the First Circuit recognized that in the language quoted *supra* from the *Hill* case, this Court had ruled that shipowners, in order to obtain the relief granted by Sections 1 and 3 of the Act of March 3, 1851, must bring themselves within the terms of such sections to obtain the exemptions from liability granted by the statute. It pointed out that the only difference between the effect of the two sections is that "when the owners may not be able, under the first section, to show absence of neglect, they may be very confident of showing, under the third section, absence of privity or knowledge" and thus obtain the benefit of that latter section since "privity or knowledge may be less than neglect". (56 Fed. at pp. 115-116.)

To the same effect, are the observations of the Circuit Court of Appeals for the Sixth Circuit in *Henson v. Fidelity & Columbia Trust Co.*, 68 F. (2d) 144, 147.

In *Hines v. Butler*, 278 Fed. 877, the Circuit Court of Appeals for the Fourth Circuit appears to have taken the same view. That Court said (p. 880):

"Without again repeating the decisions referred to by the District Judge, we agree with him that, al-

* The authorities are collected in *The Silver Palm*, 94 F. (2d) 776 at p. 777 (C. C. A. 9).

though liability exists under Section 4282,* yet the owner is entitled to limit that liability, so far as the destruction of any goods or merchandise shipped on such vessel is concerned, under the provisions of Section 4283,* to the amount of the value of the vessel and her freight then pending." (p. 880 of 278 Fed.).

A reading of Judge Rose's opinion in the District Court (264 Fed. 986) makes it fairly apparent that he considered the burden of proof to rest upon the shipowner under the Fire Statute as well as under the Limitation Statute.

As pointed out in the *Hill* case, *supra*, our Fire Statute was modeled on the British Fire Statute. It has long been well established in England that mere proof of fire is insufficient to secure the benefits of the exemption granted by the statute. The English courts hold that a shipowner must bring himself completely within all the terms of the statute to obtain the benefit of the exemption. *Lennard's Carrying Co., Ltd. v. Asiatic Petroleum Co., Ltd.*, (1915) A. C. 705, affirming (1914) 1 K. B. 419, 432; *Ingram d' Royle v. Services Maritimes du Tréport*, (1914) 1 K. B. 541, 559 (C. A.), where Kennedy, *L. J.*, pointed out that (p. 559):

"* * * it is essential for the party who is relying upon the provisions of s. 502 of the Merchant Marine Act, 1894, not merely to shew that the goods, for the loss of which he is being sued, were lost by reason of fire, but also to shew affirmatively that the loss happened without his actual fault or privity."

A like construction has been given by the Privy Council to the analogous section in the Canadian Water Carriage of Goods Act of 1910. *Royal Exchange Assurance v. Kingsley Navig. Co.* (1923) A. C. 235, 244-5, referring with approval to the foregoing language of Kennedy, *L. J.*

* R. S. 4282 is the Fire Statute and is derived from Sec. 1 of the Act of March 3, 1851. R. S. 4283 is the Limitation Statute and is derived from Sec. 3 of the same Act.

In the Second Circuit, the Courts, we submit, have, by unwarranted interpretation of the statute, treated the exemption from liability granted by the Fire Statute as a general blanket exemption from all losses by fire. In so doing, they ignore the qualifying words which limit the terms of the statute to only certain fires. Their interpretation violates the well-settled principle that the burden rests on a common carrier seeking exemption from his common law liability as an insurer of the safety of the goods entrusted to his custody to bring any loss or damage within the exact terms of a valid exception. *Clark v. Barnwell*, 12 How. 272; *Laurence v. Minuteman*, 58 U. S. 100, 111; *The Mohler*, 88 U. S. 233; *The Edwin L. Morrison*, 153 U. S. 199, 211; *The Malcolm Baxter, Jr.*, 277 U. S. 323, 334; and numerous other cases. This Court reviewed the authorities and restated the rule in *The Vallescura*, 293 U. S. 296, pointing out at p. 304:

"The reason for the rule is apparent. He is a bailee entrusted with the shipper's goods, with respect to the care and safe delivery of which the law imposes upon him an extraordinary duty. Discharge of the duty is peculiarly within his control. All the facts and circumstances upon which he may rely to relieve him of that duty are peculiarly within his knowledge and usually unknown to the shipper. In consequence, the law casts upon him the burden of the loss which he cannot explain or, explaining, bring within the exceptional case in which he is relieved from liability." (293 U. S., at p. 304).

The foregoing cases relate to contractual exemptions; but there is no distinction in principle between such an exemption and a statutory exemption. As this Court pointed out in *The Vallescura*:

"In general the burden rests upon the carrier of goods by sea to bring himself within any exception relieving him from the liability which the law otherwise imposes on him. This is true at common law with respect to the exceptions which the law itself annexed

to his undertaking, such as his immunity from liability for act of God or the public enemy. See Carver, *Carriage by Sea* (7th ed.) Chap. I., (293 U. S., at p. 303.)

The English courts have consistently ruled that a ship-owner bears the burden of bringing himself fully within all statutory exemptions from liability, whether total or partial, afforded by the British Merchant Shipping Act of 1894. That Act provides for exemptions which are almost identical with those granted by our Act of March 3, 1851. At page 34, *supra*, we have cited the cases which deal with the Fire section of the British Act. As to its Limitation provision, Viscount Haldane in *Standard Oil Co. v. Clan Line Steamers*, (1924) A. C. 100, said at p. 113:

"It is now well settled that those who plead the section as a defence must discharge the burden of proving that they come within its terms. That is to say, they must show that they were themselves in no way in fault or privity to what occurred; in this case, to the failure to render the ship properly seaworthy, by taking care that the master was instructed about the special risk arising from its shape."

The rule in the Second Circuit as to burden of proof under the Fire Section can be traced through the decisions in *The Strathdon*, *supra*, *The Salvoré*, *supra*, and *The Alder*, *supra*, down to the present case. The burden on the cargo owner has become heavier as the rule developed, until the point has now been reached where a shipowner cannot be held liable for damage by fire unless chargeable with knowledge that fire was certain to result from his action (R. 2045). In *The Silbereypress*, 1943 A. M. C. 224, recently decided by a District Court in the Second Circuit, but which has not yet reached the Circuit Court of Appeals, the court adds a further basis for exoneration, i. e., that the shipowner is not liable for damage by fire unless

his negligence is the *solo** cause of the fire. In that case, the District Court said:

"I am satisfied that the *Silverbryce* was unseaworthy on voyage 16 and throughout voyage 17 up to the time of the fire, in the way of the auxiliaries, by reason of the neglect of the owners, but the libellants have failed to establish that the cause of the fire was solely attributable to such unseaworthiness.

The limitation of turn-arounds in port and the reluctance to spend money for shore labor outside of Hong Kong demonstrates this. The failure to have the vessel overhauled at Hong Kong after notice of conditions on voyage 16, from New York to Capetown, or at Manila, and the certification by Cropley that the vessel was seaworthy when she sailed from New York on voyage 17 deserve condemnation. But considering the history of the fire statute (See *Earle & Stoddart, Inc. v. Ellerman's Wilson Line, Ltd. (The Gabley)*, 287 U. S. 420, 1933 A. M. C. 1) and references there cited, I feel it must be strictly construed, and therefore the libels are dismissed, without costs." (1943 A. M. C. 224, 251, 252.)

We submit that the importance of this question as to the burden of proof requires an authoritative ruling by this Court. Until this Court makes such a ruling, the Fire Statute will have an entirely different effect in the Second Circuit from that given it in the other Circuits.

* Cf., in this connection, the language used by this Court in *Walker v. Transportation Co.*, 3 Wall 150, 153, quoted at p. 17 of the petition.

POINT IV.

Even assuming that a mere showing of loss by fire is sufficient to shift to cargo the burden of proving neglect on the part of the shipowner, proof that the shipowner knowingly received for carriage on a general ship a large quantity of a cargo which he knew involved an abnormal fire hazard and the transportation of which the shipowner knew was in an experimental stage, is sufficient to establish "design or neglect" within the meaning of the Fire Statute.

Even if it should be conceded, for the sake of argument, that mere proof of fire was sufficient to bring such a loss as occurred in this case within the exemption granted by the Fire Statute and place upon cargo the burden of showing neglect on the part of the shipowner, it is submitted that when it was proved in the present case that the method used by the shipowner for the protection of a cargo known to be hazardous (Finding 20, R. 1983; see also R. 2042) was "uncertain and speculative", (Finding 23, R. 1984), the petitioners had fully sustained the burden which was upon them. The Circuit Court of Appeals, however, said that this was not so because "in July, 1934, it had not yet *certainly* appeared that, given properly made meal, such ventilation was inadequate to protect even such a large single block as half of 665 tons" (Italics ours) (R. 2045), which was the quantity stowed in No. 1 lower hold of the "Venice Maru". It is submitted that in making this ruling, the decision below is in square conflict with *Corneec v. Baltimore & Ohio R. R. Co.*, 48 F. (2d) 497 (C. C. A. 4). In that case the Circuit Court of Appeals for the Fourth Circuit held:

"Negligent methods of operation do not always or even generally result in disaster. The inquiry is, not whether a method of operation has been used without disastrous results, but whether it is of such a char-

acter that danger of injury is reasonably to be apprehended from its use. Where the element of danger is present, successful operation is to be deemed "fortunate rather than prudent." (48 F. (2d) at pp. 501-502.)

See also *Texas & Pac. Ry. Co. v. Carlin*, 111 Fed. 777, 781 (C. C. A. 5); *The Santa Rita*, 176 Fed. 890, 895 (C. C. A. 9); and *Johnson v. Kosmos Portland Cement Co.*, 64 F. (2d) 193, 196 (C. C. A. 6).

We have also shown at pages 15-17 of the petition that the Courts in the Fourth Circuit and the Ninth Circuit (*Bank Line v. Porter*, 25 F. (2d) 843, and *Williams S. S. Co. v. Wilbur*, 9 F. (2d) 622) have held that proof of knowledge on the part of a shipowner of the existence of a less clearly hazardous condition involving a danger of fire was sufficient to deny to the shipowner the qualified exemption from liability conferred by the Fire Statute. See also *Leonard's Carrying Co., Ltd., v. Asiatic Petroleum Co., Ltd.*, (1914) 1 K. B. 419, 441, affirmed (1915) A. C. 705 (H. L.).

The requirement laid down by the Circuit Courts of Appeals for the Second Circuit that cargo must prove that an experimental method of stowage of a hazardous cargo which was not justified by any custom or usage (Finding 25, R. 1984-5) and which had proven inadequate in two other cases of which the carrier had actual knowledge (Findings 22, R. 1984, and 34, R. 1986), created a *certainty* of fire obviously imposes upon cargo an impossible burden and amounts, as a practical matter, to repealing the qualification attached by Congress to the exemption afforded by the Fire Statute.

POINT V.

The Fire Statute by its very terms does not apply to the *in rem* liability of a vessel for cargo damage: its operation is confined to the *in personam* liability of the carrier.

The Fire Statute (46 U. S. Code, Sec. 182) merely provides that "no owner of any vessel shall be liable *** for *** any loss or damage *** by reason or by means of any fire on board any such vessel, unless such fire is caused by the design or neglect of such owner" (italics ours). It does not purport to exonerate the vessel itself. The Circuit Court of Appeals here, however, held (R. 2043) that the Fire Statute is applicable to the vessel's liability. It concedes (R. 2043) that such holding is in conflict with the decision of the Circuit Court of Appeals for the Fifth Circuit in *The Etna Maru*, 33 F. (2d) 232. It says in reference to *The Etna Maru*:

"So far as that decision retains any authority after *Earle & Stoddart v. Wilson Line*, 287 U. S. 420, we cannot agree. Section 182 gives complete exoneration of liability; Section 183 only a limitation of liability". (R. 2043).

It is true that in so far as *The Etna Maru* held that an owner of an unseaworthy vessel may not claim the benefit of the Fire Statute if the unseaworthiness could have been discovered by due diligence, that decision was disapproved by this Court. But there is nothing in the decision in the *Earle & Stoddart* case which indicates that this Court disapproved *The Etna Maru* where it held that the ship would be liable *in rem* when the owner was not liable *in personam*. The language used by this Court in *Earle & Stoddart* (p. 427 of 287 U. S.) with respect to *The Etna Maru*, reads as follows:

"In *The Etna Maru*, 20 F. (2d) 143, the District Court was of opinion that the fire statute did not con-

fer immunity where the loss was due to unseaworthiness existing at the beginning of the voyage." As an alternative ground of decision, however, the court held that the vessel-owner had not overcome a presumption of personal neglect, arising from the fact of unseaworthiness. On appeal the case was affirmed, 33 F. (2d) 232, but apparently on the ground that the fire statute, like the statutes limiting the extent of liability, leaves the owner liable, in any event, up to the value of the ship. But compare *The Rapid Transit*, 52 Fed. 320, 321. In so far as the decision rests on the ground advanced by the cargo-owners here, it cannot be approved."

It is submitted that the Circuit Court of Appeals for the Fifth Circuit was entirely right in the position which it took. It is well settled that when cargo is placed aboard a vessel, the ship becomes bound to the cargo and the cargo to the ship and an *in rem* liability is created if the ship loses or damages the cargo. See *Dupont v. Vanice*, 19 How. 162, where this Court said:

"The right of the shipper to resort to the vessel for claims growing directly out of his contract of affreightment, has very long existed in the general maritime law. It is found asserted in a variety of forms in the Consulado, the most ancient and important of all the old codes of sea laws, (see Chaps. 63, 106, 227, 254, 259) and the maxim that the ship is bound to the merchandise, and the merchandise to the ship, for the performance of the obligations created by the contract of affreightment, is a settled rule of our maritime law." (19 How. at pp. 168, 169).

See also *The Keokuk*, 9 Wall. 517, 519; *The Belfast*, 7 Wall. 624, 642; *The Eddy*, 5 Wall. 481, 494; *The Delaware*, 14 Wall. 579, 596.

In *Schooner Freeman v. Buckingham*, 18 How. 182, this Court dealt with a situation in many respects similar to that which the Court has before it in the present case, viz., where a shipowner has entrusted the entire control and

employment of its ship to another. In the *Schooner Freeman v. Buckingham*, this Court held:

" * * * that when the general owner intrusts the special owner with the entire control and employment of the ship, it is a just and reasonable implication of law that the general owner assents to the creation of liens binding upon his interest in the vessel, as security for the performance of contracts of affreightment made in the course of the lawful employment of the vessel." (18 How. at p. 190).

By Section 5 of the Act of March 3, 1851, which is now embodied in 46 U. S. Code, Section 186, it is provided:

"The charterer of any vessel, in case he shall man, victual, and navigate such vessel at his own expense, or by his own procurement, shall be deemed the owner of such vessel within the meaning of the provisions of this chapter relating to the limitation of the liability of the owners of vessels; and such vessel, when so chartered, shall be liable in the same manner as if navigated by the owner thereof". (46 U. S. Code, §186).

It is only by virtue of this provision that the "K" Line has any right whatever to assert that it has the benefit of either Section 1 of the Act of March 3, 1851, the Fire Statute, or Section 3 of the same Act, the Limitation Statute. By the terms of Section 5, the charterer is deemed the owner of the vessel within the meaning of the Act. This circumstance, however, does not affect the "*in rem*" liability of the ship. The statute says so. Its language no doubt was inspired by that of Mr. Justice Story in *United States v. Brig Malek Adhel*, 2 How. 210, at p. 233:

"The vessel which commits the aggression is treated as the offender, as the guilty instrument or thing to which the forfeiture attaches, without any reference whatsoever to the character or conduct of the owner."

Notwithstanding this clear language of Mr. Justice Story, the Circuit Court of Appeals in the present case

dismissed this well settled doctrine of this Court as "a bit of mythology, a fiction not to be applied to defeat a statute designed to protect and foster maritime enterprise" (R. 2043). The Court in making this ruling is in square conflict with *United States v. Brig Malek Adhel*, 2 How. 210, *supra*, and with *The Barnstable*, 181 U. S. 464, *The Schr. Freeman v. Buckingham*, 18 How. 182, *The Yankee Blade*, 19 How. 82, 89, *The China*, 7 Wall. 52, *The John G. Stevens*, 170 U. S. 113, 120, and *Homer Ramsdell Co. v. Compagnie Generale Transatlantique*, 182 U. S. 406. It is also in conflict with *The Young Mechanic*, Fed. Cas. No. 18181; *Parson v. Cunningham*, 63 Fed. 132 (C. C. A. 1).

The Circuit Court of Appeals was in error when it said that the application of what it calls "a bit of mythology" would defeat the statute. It overlooked the last provision in Section 5 of the Act of March 3, 1851, which is that the charterer who mans, victuals and navigates a vessel at his own expense, shall be deemed the owner, and that, under these circumstances, the vessel "shall be liable in the same manner as if navigated by the owner thereof" (46 U. S. Code, §186; see p. 42; *supra*). The "K" Line did man, victual and navigate the "Venice Maru" at its own expense (Finding 2, R. 1979-80). This circumstance, by the language of the statute, did not affect the liability of the vessel. The statute provided that she should "be liable in the same manner as if navigated by the owner thereof." The interpretation of the Act by the Circuit Court of Appeals for the Fifth Circuit does not defeat the mandate of the statute. It is the interpretation in the Second Circuit which defeats that mandate by rendering nugatory the concluding words of its Section 5.

If the reasoning of the Court below in its interpretation of the statute is correct, then the "K" Line, not being the owner of the "Venice Maru," would not be entitled to the exemption given by Section 1, which would then only apply to Kawasaki Zosenjo. But the Court held that the

statute did apply to the "K" Line and afforded it exemption of its liability as charterer.

Even in cases where the fault is entirely that of a bare-boat charterer, a decree for loss by negligence may be made directly against the ship and need not provide that collection shall be made from the charterer. *The Alert*, 61 Fed. 113, affirming 40 Fed. 836, following *Schr. Freeman v. Buckingham*, 18 How. 182, *supra*.

The view of Congress contained in Sec. 5 of the Act of March 3, 1851, (now 46 U. S. C., Sec. 186), remains the view of Congress today. See *Carriage of Goods by Sea Act of 1936*, Title 46, U. S. Code, Section 1301, *et seq.*, where in Section 1304 (2) of Title 46, U. S. Code, it is provided:

"Neither the carrier nor the ship shall be responsible for loss or damage arising or resulting from * * * Fire, unless caused by the actual fault or privity of the carrier; * * * (Italics ours.)

If it had been considered that a provision exonerating a carrier was sufficient, there would have been no need to mention "the ship". Any doubt on this subject is removed, by Section 1308 of that Act, which provides:

"The provisions of this chapter and section 25 of Title 49 shall not affect the rights and obligations of the carrier, under the provisions of sections 175, 181 to 188* and 801 to 842 of this title or of any amendments thereto; or under the provisions of any other enactment for the time being in force, relating to the limitation of the liability of the owners of seagoing vessels". (Title 46 U. S. Code, 1308). (Italics ours.)

In this section, Congress specifically refers only to the rights and obligations of the carrier.

* These sections include the original provisions of the Act of March 3, 1851, i. e., the Fire Statute, the Limitation Statute and the Charterer Section.

This conceded conflict between the Circuit Court of Appeals of the Second and Fifth Circuits, as well as the conflict below with many decisions of this Court, should be resolved by this Court.

CONCLUSION.

For the foregoing reasons, a writ of certiorari should be granted in this case.

Respectfully submitted,

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T. CATESBY JONES,
EZRA G. BENEDICT FOX,
THOMAS H. MIDDLETON,
Proctors for Petitioners.

APPENDIX.

THE FIRE STATUTE.

(Section 1 of the Act of March 3, 1851, C. 43, 9 Stat. 635, now 46 U. S. Code, Sec. 182, formerly R. S. 4282.)

"No owner of any vessel shall be liable to answer for or make good to any person any loss or damage, which may happen to any merchandise whatsoever, which shall be shipped, taken in, or put off board any such vessel, by reason or by means of any fire happening to or on board the vessel, *unless such fire is caused by the design or neglect of such owner.*" (Italics yours.)

LIMITATION STATUTE.

(Section 3 of the Act of March 3, 1851, C. 43, 9 Stat. 635, now 46 U. S. Code, Sec. 183, formerly R. S. 4283.)

"The liability of the owner of any vessel, for any embezzlement, loss, or destruction, by any person, of any property, goods, or merchandise, shipped or put on board of such vessel, or for any loss, damage, or injury, by collision, or for any act, matter, or thing, loss, damage, or forfeiture, done, occasioned, or incurred without the privity or knowledge of such owner or owners, shall in no case exceed the amount or value of the interest of such owner in such vessel, and her freight then pending."

CHARTERER MAY BE DEEMED OWNER.

(Section 5 of the Act of March 3, 1851, C. 43, 9 Stat. 636, now 46 U. S. Code, Sec. 186, formerly R. S. 4286.)

"The charterer of any vessel, in case he shall man, victual, and navigate such vessel at his own expense, or by his own procurement, shall be deemed the owner of such vessel within the meaning of the provisions of this chapter relating to the limitation of the liability of the owners of vessels; and such vessel, when so chartered, shall be liable in the same manner as if navigated by the owner thereof."

COPY

IN THE
Supreme Court of the United States
OCTOBER TERM, 1942.
No. 881.

In the Matter

of the

Petition of KABUSHIKI KAISHA KAWASAKI ZOSENJO, Owner,
and KAWASAKI KISEN KABUSHIKI KAISHA, Bareboat
Charterer of the steamship "VENICE MARU", for Exon-
eration from and Limitation of Liability.

CONSUMERS IMPORT CO., INC., *et al.*,
Cargo Claimants-Petitioners.

KABUSHIKI KAISHA KAWASAKI ZOSENJO and KAWASAKI
KISEN KABUSHIKI KAISHA,
Respondents.

REPLY BRIEF ON BEHALF OF PETITIONERS.

D. ROGER ENGEAR,
T. CATESBY JONES,
EZRA G. BENEDICT FOX,
THOMAS H. MIDDLETON,
Proctors for Petitioners.

April 24, 1943.

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KISEN KABUSHIKI KAISHA,
Respondents.

REPLY BRIEF ON BEHALF OF PETITIONERS.

For reasons of their own, respondents do not deal with the questions presented in the petition, either in the form or the order as they are there submitted. Respondents have elected to state the issues in the form of Propositions A-D (Respondents' Brief, p. 7), which they attempt to answer under their Points I-IV (Respondents' Brief, pp. 8, 17, 21, 26).

At page 9 of their brief respondents quote the first and third sections of the Act of March 3, 1851. As to the difference between these two sections, we refer to the statement of this Court in *Providence, etc. Co. v. Hill Manufacturing Co.*, 109 U. S. 578, 602, where this Court pointed out that under the first section the exemption is

total, whereas under the third section the exemption is partial, but that under the first section the shipowner must show more than under the third section to bring himself within the exemption.

At page 10 of their brief, respondents attempt to make capital of the fact that the Circuit Court of Appeals for the Fourth Circuit in *Charbonier, et al. v. United States*, 45 F. (2d) 174, did not comment on the ruling of the District Court in that case as to the burden of proof. That point, however, was not involved on the appeal. They attempt to spell out an approval of the District Court's ruling on the point by the following abbreviated quotation from the Circuit Court of Appeals' opinion: "The exhaustive and painstaking opinion of the District Judge in these cases *** correctly sets out the issue ***." The full quotation is: "The exhaustive and painstaking opinion of the District Judge in these cases contains the following statement which correctly sets out the issues and salient facts involved in the controversy: ***." (45 F. (2d) at p. 175). There then follow extracts from the District Court's opinion dealing with the facts of the case, but it is noteworthy that there is not a single line in the extracts dealing with the question of burden of proof.

On the next page of their brief (p. 11), respondents assert that "petitioners have misquoted (petition, p. 15) a portion of this Court's opinion in *Walker Transportation Co.*, 3 Wall. 150, 153?" and then purport to set forth "the exact words employed by Mr. Justice Miller". We have again examined Mr. Justice Miller's opinion in the official report, 3 Wall. 150, and we find our quotation to be exactly as contained in the official report but that the language used in the alleged quotation on page 11

of respondents' brief, with the exception of the last sentence thereof, does not appear in the official report of that opinion. This matter is important because Mr. Justice Miller made it clear that the exemption or exception of fire was a qualified one. As the House of Lords said in *Lennard's Carrying Co., Ltd., v. Asiatic Petroleum Company*, (1915) A. C. 705, 715-716, a ship-owner who desires the benefit of a statutory exemption must bring himself fully within its terms. See particularly page 16 of the petition and our brief at pages 34-36.

At page 23 respondents attempt to negative the conflict between *Williams S. S. Co. v. Wilbar*, 9 F. (2d) 622, (C. C. A. 9) and the case at bar. In addition to our discussion of this case at page 9 of the petition, we might also point out that Captain Fegen had previously laid out in a like manner the stowage of the "Getsuyo Maru" on which there was overheating (R. 2042-3). Furthermore, both ships were stowed at Kobe where the head office of the "K" Line was located. Mr. Okubo was, therefore, charged with knowledge as to such conditions. *Christopher v. Grubey*, 40 F. (2d) 8 (C. C. A. 1); *The Glenboig*, 84 F. (2d) 441, (C. C. A. 6).

Twice in their brief (at page 7 and at page 28) respondents make the statement that there had been only five cases of overheating "out of 112 previous voyages". This assertion is misleading in two respects: (1) it fails to differentiate between the much shorter voyage from Japan to United States Pacific Coast ports as compared with the longer voyage here involved from Kobe to Atlantic ports via Los Angeles and the Panama Canal; and (2) it fails to take into account the very material difference between the carriage of small quantities of sardine meal and the carriage of large quantities. Both courts below found the respondents negligent for carrying such

a large quantity stowed in the manner found by them. The "K" Line was aware of this fact through its own experience. It was found below that all cases of overheating occurred on "K" Line vessels which carried large quantities of sardine meal and after these vessels had left Los Angeles on the way to the Atlantic Coast (R. 631; Finding 22, R. 1984).

Of the 112 voyages cited by respondents, only 25 were to the United States Atlantic Coast and the quantity carried on some of these 25 voyages was very small (Ex. 42, R. 1961). In point of fact, as is shown by Respondents' own List (Ex. 42, R. 1961), there had been, prior to this voyage of the "Venice Maru", only 12 "K" Line ships sailing from Japan carrying as much as 1,000 tons of sardine meal to Atlantic Coast ports. On six of these, there was overheating (R. 40) and there had also been overheating on one other vessel (the "Tohsei Maru") which carried less than 1,000 tons (R. 625). In other words, the mortality rate was 50% where attempts were made to carry as much as 1,000 tons from Japan to the Atlantic Coast. The total which the "K" Line contracted to carry on the "Venice Maru" was 38,000 bags or 1,900 tons (Finding 5, R. 1981).

We have refrained from imposing on the Court's time to answer the whole of respondents' brief, but we felt that at least the foregoing inaccuracies should be called to the attention of the Court.

Respectfully submitted,

D. ROGER ENGLAR,
T. CATESBY JONES,
EZRA G. BENEDICT FOX,
THOMAS H. MIDDLETON,
Proctors for Petitioners.

April 24, 1943.

~~COPY~~
IN THE
Supreme Court of the United States
OCTOBER TERM, 1943.
No. 32.

In the Matter
of the

Petition of KABUSHIKI KAISHA KAWASAKI ZOSENJO, Owner,
and KAWASAKI KISEN KABUSHIKI KAISHA, Bareboat
Charterer of the steamship "VENICE MARU", for Exon-
eration from and Limitation of Liability.

CONSUMERS IMPORT CO., INC., *et al.*,
Cargo Claimants-Petitioners,

vs.

KABUSHIKI KAISHA KAWASAKI ZOSENJO and KAWASAKI
KISEN KABUSHIKI KAISHA,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT
COURT OF APPEALS FOR THE SECOND CIRCUIT.

BRIEF ON BEHALF OF PETITIONERS.

D. ROGER ENGLAR,
T. CATESBY JONES,
EZRA G. BENEDICT FOX,
THOMAS H. MIDDLETON,
Proctors for Petitioners.

September 25, 1943.

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1943.

No. 32.

In the Matter

of the

Petition of KABUSHIKI KAISHA KAWASAKI ZOSENJO, Owner,
and KAWASAKI KISEN KABUSHIKI KAISHA, Bareboat
Charterer of the steamship "VENICE MARU", for Exon-
eration from and Limitation of Liability.

CONSUMERS IMPORT CO., INC., *et al.*,

Cargo Claimants-Petitioners.

vs.

KABUSHIKI KAISHA KAWASAKI ZOSENJO and KAWASAKI
KISEN KABUSHIKI KAISHA,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT
COURT OF APPEALS FOR THE SECOND CIRCUIT.

BRIEF ON BEHALF OF PETITIONERS.

Statement.

The Consumers Import Co., Inc., and other cargo owners, petitioned this Court for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit against two respondents: (1) Kabushiki Kaisha Kawasaki Zosenjo; and (2) Kawasaki Kisen Kabushiki Kaisha; and presented five questions for consideration by this Court. On May 10, 1943, this Court

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entered an order granting certiorari, pursuant to the prayer of the petition, but limited the argument to the fifth question presented, which is as follows: "Does the Fire Statute extinguish maritime liens for cargo damage or is its operation confined to *in personam* liability only?" In obedience to the order of the Court, this brief is confined to the fifth question submitted.

The opinion of the Circuit Court of Appeals for the Second Circuit is printed at pages 60-69 of the Record and is reported in 133 F. (2d) 781. The opinion of the District Court (Southern District of New York—Bondy, J.) is printed at pages 33-40 of the Record and is reported in 39 Fed. Supp. 349. The District Court's Findings of Fact and Conclusions of Law appear at pages 40-50 of the Record. The District Court decree, which the Circuit Court of Appeals affirmed (R. 69), is printed at pages 50-55 of the Record.

Jurisdiction.

The jurisdiction of this Court over this case is based on Section 240 of the Judicial Code (28 U. S. Code, Sec. 347) and Article III, Section 2, of the Constitution of the United States.

The Matter Involved.

Your petitioners (cargo-claimants-appellants in the Court below) are the owners or holders for value of bills of lading covering several hundred shipments of merchandise which were destroyed or seriously damaged by a fire—or by the means used to extinguish the fire—which occurred on August 6, 1934, on board the Japanese steamship "Venice Maru", a general ship and common carrier, while on a voyage from Japan to United States Atlantic Coast ports via Los Angeles and the Panama Canal.

Respondent Kabushiki Kaisha Kawasaki Zosenjo, the owner, (herein called Kawasaki Zosenjo), is the dry-dock company which built the "Venice Maru" and thereafter let her under a bareboat form of charter to the other respondent, Kawasaki Kisen Kabushiki Kaisha (herein called the "K" Line or the Carrier). At all material times the "K" Line, pursuant to the bareboat-form of charter (Ex. 17, R. 31-3) from Kawasaki Zosenjo, was in possession of the "Venice Maru", appointed and paid her master and crew, and operated her as a common carrier (Finding 2, R. 40).

The bills of lading here sued upon named on their face the "Venice Maru", "commanded by T. Inouye for the present voyage", as the carrying vessel and, after referring to the exceptions and conditions set forth on the reverse side, conclude with the clause: "IN WITNESS WHEREOF, the owners or Agents of the said vessel have signed * * *" (Ex. 9, R. 30 A). The owner of the "Venice Maru" (Kawasaki Zosenjo) concededly "had nothing whatsoever to do with the * * * operation or control of the ship" (Finding 1, R. 40); the bills of lading were all in fact signed by the bareboat charterer (the "K" Line) or at outports by its duly authorized agents (Finding 3, R. 40-41). More important, however, is the fact that immediately after the signature on the bills of lading appears the phrase: "For Master" (Ex. 9, R. 30 A). The breach of such contracts gave the petitioners a maritime lien against the "Venice Maru" and a right of action *in rem* against her (see pp. 16-17, *infra*). In signing the bills of lading, the master did not act as agent for the owner, nor did the carrier so act. It was the other way about, for, even at the home port, the "K" Line executed them "For Master". Such contracts are ship contracts, not owner's contracts. Indeed, it is well settled that the master's authority to bind the ship to such a contract is not derived from the owner or carrier, but is created by the Maritime law, by virtue of the master's position as master. See cases cited at pages 24-25, *infra*.

Your petitioners filed libels *in rem* against the "Venice Maru" for the breach of these contracts of carriage (R. 5). Thereafter the two respondents (referred to as petitioners in the District Court), on November 16, 1934, secured an *ex parte* order (R. 12-14) enjoining the prosecution of these libels against the vessel; by instituting a proceeding in Admiralty in the United States District Court for the Southern District of New York, wherein they prayed for exemption from or the limitation of liability in respect of claims for such loss and damage to cargo under the provisions of the Act of March 3, 1851 (now 46 U. S. Code, Sec. 182-186, formerly R. S., Sec. 4282-86) (R. 1-8). Kawasaki Zosenjo's sole connection with the case is that of a petitioner which joined with the "K" Line in seeking an injunction against the prosecution of the suits *in rem* against the steamship "Venice Maru". In lieu of surrendering the "Venice Maru" to a trustee, as is provided for in Section 4 of that Act (now 46 U. S. Code, Sec. 185), the respondents exercised the option afforded under this Court's Admiralty Rule LI and filed an *ad interim* stipulation (R. 9-11) with surety who undertook thereby that the petitioners (respondents here) would pay into Court at the proper time "the amount or value of the petitioners' interest in said vessel and her pending freight, if any" (R. 10) and that, in the interim, "this stipulation shall stand as security for all claims in said limitation proceedings" (R. 10).

Such a stipulation in admiralty stands as a substitute for the ship and the matter is thereafter dealt with as "if the thing itself were still in (the Court's) custody". *The Palmyra*, 12 Wheat. 1, at p. 9. See also, among others, U. S. v. Ames, 99 U. S. 35. So also in *Hartford Accident Co. v. So. Pac. Co.*, 273 U. S. 207, in discussing the nature of a limitation proceeding such as this is, this Court said at p. 217:

"The jurisdiction of the admiralty court attaches *in rem* and *in personam* by reason of the custody of

the *res* put by the petitioner into its hands" (p. 217 of 273 U. S.).

See also *The City of Norwich*, 118 U. S. 468, at p. 502.

Therefore, the case is here as a suit *in rem*, and neither Kawasaki Zosenjo nor the "K" Line need be considered except in so far as they have injected themselves into the proceedings by filing the petition and stipulation aforesaid. In short, the liability which Kawasaki Zosenjo, the owner of the "Venice Maru", sought to defend below and seeks to defend here, is that of the steamship "Venice Maru" *in rem* and not any liability of its own arising from the contracts of affreightment. Admittedly, Kawasaki Zosenjo did not execute any of the bills of lading; they were all signed either by the "K" Line or by its duly authorized agents (Finding 3, R. 40-41), "for Master" (R. 30 A). Thus, the only liability of the Kawasaki Zosenjo present in this case is the liability voluntarily assumed by it when it saw fit to join itself with the "K" Line as a petitioner in instituting these limitation proceedings, i. e., its liability, as owner of the "Venice Maru", to pay into Court on order the value of that vessel. *The Paraiso*, 226 Fed. 966. See also *The City of Norwich*, 118 U. S. 468 at p. 502.

The damage to the cargo is conceded (R. 5). The defense asserted by respondents is that the vessel is not liable because of the provisions of the so-called Fire Statute (see Appendix A, p. 43), now 46 U. S. Code Sec. 182 (formerly R. S. Sec. 4282), which is derived from the Act of Congress of March 3, 1851, c. 43, Sec. 1, 9 Stat. 635, as amended. That provision of the Act of March 3, 1851, as carried over into the U. S. Code (Sec. 182 of Title 46), provides that "no owner of any vessel shall be liable to answer for or make good to any person any loss or damage, which may happen to any merchandise whatsoever, which shall be shipped, taken in, or put on board any such vessel, by reason or by means of any fire happening to or on board the vessel", etc. It contains

no reference to liability as a result of a master's contract, although the other provision of the same Act relating to liability for valuables does contain such a provision (Section 2 of the Act of March 3, 1851; now 46 U. S. Code Sec. 181; Appendix A, at p. 43). Nor does it contain any reference to the *in rem* liability of the vessel.

The District Court made elaborate findings of fact (R. 40-47), which were adopted by the Circuit Court of Appeals (R. 68-9). For the present argument it is sufficient to call the Court's attention to the following:

"The stowage of the 665.6 tons of sardine meal in No. 1 lower hold, as described in findings (18) and (27), was a proximate cause of the fire in that, even assuming that rice ventilators were used in the manner claimed by the 'K' Line, insufficient ventilation was provided" (Finding 28, R. 44-5);

"The stowage of the sardine meal on the 'Venice Maru' was negligent and made the vessel unseaworthy" (Finding 49, R. 47);

"Due diligence to make the vessel seaworthy was not exercised by Captain Fegen in stowing the sardine meal in No. 1 lower hold of the 'Venice Maru'" (Finding 50, R. 47).

In view of the foregoing findings and particularly because the bill of lading was, by clause 26 thereof (Ex. 9, R. 30 B), specifically subject to the Harter Act (Act of February 13, 1893—46 U. S. Code Secs. 190-196; Appendix B), which renders invalid any contract provisions exempting against negligent stowage or avoiding the obligation to exercise due diligence to make the ship seaworthy, it is clear that the bill of lading exceptions afford no basis for exoneration, but that the only possible defense to claims for cargo damage so caused rests on the statutory exemption afforded by the Fire Statute (now 46 U. S. Code, Sec. 182), which merely provides that "no

owner of any vessel shall be liable" for damage to cargo on board the vessel by fire "unless such fire is caused by the design or neglect of such owner". (For full text of the Statute see Appendix A.)

The Circuit Court of Appeals below in holding that the Fire Statute exonerated the vessel went beyond the words of the statute. It held that since the fire had occurred "without the design or neglect" of either the owner or the bareboat charterer of the "*Venice Maru*" personally, the Fire Statute (46 U. S. Code, Sec. 182) exonerated the ship *in rem* as well as the carrier *in personam* from all liability (R. 63-64).^{*} It specifically refused (R. 63) to follow the ruling in *The Etna Maru*, 33 F. (2d) 232, certiorari denied 280 U. S. 603.^{**} There the Circuit Court of Appeals for the Fifth Circuit had held that the Fire Statute (Sec. 1 of the Act of March 3, 1851; now 46 U. S. Code, Sec. 182) was to be construed in *pari materia* with the other provisions of the Act of March 3, 1851, which leave the shipowner "liable to the extent of his ship and freight for the negligence and misconduct of his employees" (p. 234 of 33 F. (2d)) and that (pp. 234-5 of 33 F. (2d)) "there is nothing in the statute to bar a re-

* The District Court in its opinion (R. 33-40) did not discuss this question; but its decree, which the Circuit Court of Appeals affirmed (R. 69), perpetually enjoined "all persons or corporations, having or claiming to have sustained any loss, damage, destruction or injury by reason of or in connection with the fire referred to in the petition *** from instituting or prosecuting *** any claim, action, suit or proceeding whatsoever *** against the steamship 'Venice Maru' her engines, etc. ***" (R. 54).

** The Circuit Court felt that the decision of this Court in *Earle & Stoddart v. Wilson Line*, 287 U. S. 420, has deprived *The Etna Maru* of much of its authority. The *Earle & Stoddart* case involved only the carrier's liability *in personam* and did not in any way touch upon the question of the effect of the Fire Statute upon the vessel's *in rem* liability. Since this question was raised by respondent in its brief in opposition to the petition for a writ of certiorari and the writ was, nevertheless, granted, we take it that the court agrees that the *Earle & Stoddart* case did not dispose of this question.

covery against the ship", *i. e.*, nothing to affect the ship's *in rem* liability in respect of damage sustained after the goods had been loaded on board as distinguished from the carrier's separate *in personam* liability. This case is here to resolve this conflict between the two circuits.

The Statutes Involved.

As pointed out by Judge Foster in *The Etua Maria*, 33 F. (2d) 232, at p. 234:

"Prior to 1851, under the common law, the liability of the shipowner for damages to freight caused by a fire on board ship was that of an insurer, and absolute, unless the fire was caused by an act of God or the public enemy, his personal liability was limited only by the amount of the loss and his ability to respond. *New Jersey Steam Navigation Co. v. Merchants' Bank*, 6 How. 344, 12 L. Ed. 465; *The Main v. Williams*, 152 U. S. 122, 14 S. Ct. 486, 38 L. Ed. 381."

The decision of this Court in *N. J. Steam Navig. Co. v. Merchants' Bank*, 6 How. 344, an action *in personam* based upon a common law liability, led* to the passage of the Act of March 3, 1851 (9 Stat. 635), which was later carried into the Revised Statutes as Section 4281, *et seq.*, and is now designated as 46 U. S. Code, Secs. 181-186. The original text of the Act of March 3, 1851, is set forth in *Norwich Co. v. Wright*, 13 Wall. 104, at pp. 105-106, and the relevant sections of the original text together with their present wording in the U. S. Code are printed in Appendix A.

Section 1 of the Act of March 3, 1851 (now 46 U. S. Code 182, formerly R. S. Sec. 4282) is popularly known

* This was pointed out in *Moore v. Am. Transp. Co.*, 65 U. S. 1, at p. 38, shortly after the passage of the Act, and again by Mr. Justice Mathews at p. 533 of 118 U. S.

as the Fire Statute. It contains no reference whatsoever to the liability of the ship *in rem* for loss or damage by fire to merchandise which has been shipped on board, but provides merely: "No owner of any vessel shall be liable to answer" for such loss or damage.*

By Section 5 of the Act of March 3, 1851 (now 46 U. S. Code, Sec. 186, formerly R. S. Sec. 4286), the protection of the statute was extended to a charterer who manned, victualled and operated the vessel, *i. e.*, to a carrier in the position of the "K" Line. That provision of the statute provides that such a charterer "shall be deemed the owner of such vessel" (See 46 U. S. Code, Sec. 186), and that then the vessel "shall be liable in the same manner as if navigated by the owner thereof".

It was not, however, until 1936, or two years after this cause of action arose, that Congress in the Carriage of Goods by Sea Act gave exoneration to the ship against "*in rem*" liability for loss from fire by Section 4, subdivision 2 (b), of that Act which reads:

"Neither the carrier *nor the ship* shall be responsible for loss or damage arising or resulting from * * * (b) Fire, unless caused by the actual fault or privity of the carrier; * * *." (Italics ours.) (46 U. S. Code, Sec. 1304, sub. 2 (b).**) .

* This and the other quoted references to the Act of March 3, 1851, embody the wording set forth in Title 46 of the United States Code. As appears from Appendix A, the differences between the original wording and that used in the Code are very slight and immaterial.

** The fact that subdivision 2 (b) of Section 4 of the Carriage of Goods by Sea Act of 1936 now gives exoneration to the ship for loss from fire does not render the question presented in the case at bar academic since the provisions of that Act apply only to bills of lading or similar documents of title which are "evidence of a contract for the carriage of goods by sea * * * *in foreign trade*" (46 U. S. Code, Sec. 1300) and it is specifically not "applicable to charter parties" (46 U. S. Code Sec. 1305). Thus, in respect of goods carried pursuant to charter parties and also

Petitioners' Position.

Our position is that the decision here should be in favor of the petitioners because the liabilities here sought to be enforced are *in rem* liabilities arising from the breach of a master's bill of lading which created a maritime lien on the vessel and were wholly separate and independent of any *in personam* liability on the part of the vessel-owner or of the carrier and that there was no provision of a statute of the United States until 1936 which gave the vessel any exemption from its *in rem* liability for loss by fire, the Fire Statute (See, 1 of the Act of March 3, 1851, now 46 U. S. Code, Sec. 182) by its terms merely exempting the "owner" and bareboat charterer from personal liability for such losses.

Although the Act of March 3, 1851, may be a remedial statute, we submit that the Fire Statute as now construed in *Earle & Stoddart v. Wilson Line*, 287 U. S. 420, and in the decision in this case, holding that the statute exempts the shipowner from liability *in personam* even when a fire is caused by unseaworthiness arising from gross negligence on the part of those in charge of the ship, goes beyond any other exemption allowed a common carrier against negligence known to the law. The Courts in this holding did so because they were of opinion that the language of the statute required that they so hold. Obviously, the statute should not be construed as extending such a broad exoneration to the separate liability of the ship *in rem* unless it is equally clear from

[Footnote continued from preceding page.]

in respect of goods carried under bills of lading covering coastal and inter-coastal voyages and voyages on the Great Lakes and our inland waterways, the Fire Statute remains the only statutory exemption relating to losses by fire. Furthermore, that Act expressly provides in Section 1308 that its provisions "shall not affect the rights and obligations of the carrier under the provisions of sections 175, 181 to 188 and 801 to 842 of this title", which embraces the Fire Statute.

the language of the statute that Congress intended that such exemption should apply to the vessel itself as well as to the shipowner; and this is particularly true since such an extension to include the ship's liability *in rem* would be inconsistent with the nature of a maritime lien fundamental to our admiralty jurisprudence. So far from any such mandate existing, we submit that the statute itself contains within its own bounds language showing that Congress never had any intention of extending the exemption to the ship or to a master's contract. There are two sections in the statute which give the shipowner exemption from liability. The first section gives the shipowner relief against fire. The second section gives both the master and the shipowner relief against embezzlement or loss of valuable goods. However, the sixth section expressly provides that the Statute shall not—

“take away or affect the remedy to which any party may be entitled, against the master, officers, or seamen, for or on account of, any embezzlement, injury, loss, or destruction of merchandise, or property, put on board any vessel, or on account of any negligence, fraud, or other malversation of such master, officers, or seamen, respectively, nor to lessen or take away any responsibility to which any master or seaman of any vessel may by law be liable, notwithstanding such master or seaman may be an owner or part owner of the vessel” (46 U. S. Code, Sec. 187; Appendix A, pp. 45-46).

Moreover, Congress, in enacting the Fire Statute, referred only to the owner's personal liability and did not refer to the ship's *in rem* liability whereas, later, in enacting the Carriage of Goods by Sea Act of 1936, it specified that “neither the carrier nor the ship shall be responsible . . .” (46 U. S. Code, Sec. 1304; sub. 2). Judge Hough was one of the American Commissioners who attended the

International Conference at Brussels which adopted the Convention, signed August 25, 1924, which was later carried into our law by the Carriage of Goods by Sea Act. When it is noted that his article in defense of the admiralty lien and suits *in rem* appeared in the March, 1924, issue of the Harvard Law Review (37 Harvard Law Review, p. 529), it is obvious that the exemption of "the ship", as such, in the Act of 1936 could not have found its way into that statute through inadvertence.

It is of interest also to note that when Congress enacted the Harter Act (Act of February 13, 1893, now 46 U. S. Code, Secs. 190-196; Appendix B, pp. 46-48), it used express words when it exempted the vessel, in addition to her owner or charterer, from liability for the causes of loss set forth in Section 3 of that Act. Section 3 is the only paragraph of that Act which grants exemptions to the vessel and the owner (see 46 U. S. Code, Sec. 192). There the language is: "Neither *The vessel*, her owner or owners, agents, or charterers shall become or be held responsible for damage or loss", etc. (Italics ours), and the same language is repeated as to other exemptions later in the same section. But significantly fire is not one of the perils there exempted against. In fact, Section 6 of the Act of February 13, 1893 (27 Stat. 446; now 46 U. S. Code, Sec. 196; Appendix B, at p. 48) expressly provided that:

"This act shall not be held to modify or repeal sections forty-two hundred and eighty-one, forty-two hundred and eighty-two—the Fire Statute—"and forty-two hundred and eighty-three of the Revised Statutes of the United States, or any other statute defining the liability of vessels, their owners, or representatives."

The contract here is a master's contract, and the loss was due to bad stowage, which was the master's duty to do properly (*The Nidarholm*, 282 U. S. 681, 684, and cases

there cited; in addition see particularly *The Delaware*, 14 Wall. 579, 604, and Judge Brown's decision in *The Centurion*, 57 Fed. 412, 416). The breach of that contract created a maritime lien or right *in rem* against the vessel. See cases at pages 16-17, *infra*.

Section 2 of the Act of March 3, 1851, now 46 U. S. Code, Section 181, grants exemption to "the master and owner of such vessel, *** as carriers" for loss of valuable shipments. It has been held that this exemption is given in respect of the carrier's liability only and that it does not extend to the shipowner's liability as bailee. *Kuhnhold v. Compagnie Générale Transatlantique*, 251 Fed. 387, at p. 389; *Wheeler v. Oceanic Steam Navigation Co.*, 125 N. Y. 155, 26 N. E. 248, 21 Am. St. Rep. 729; *Mallory S. S. Co. v. Bahia* (Tex. Civ. App.), 154 S. W. 282; *La Bourgogne*, 144 Fed. 781, at p. 786, 75 C. C. A. 647; affirmed in 210 U. S. 95. If Congress had intended in Section 1 to exempt the master from the breach of his contract and the ship from the maritime lien which arises in consequence of the breach, it is strange that no words in Section 1 refer to the master's liability as they do in Section 2.

In *Wheeler v. The Oceanic Steam Navigation Co.*, 125 N. Y. 155, at 160, the Court, notwithstanding the sweeping words which deny liability of the carrier "in any form or manner", refused to extend the denial of liability granted by the statute to a loss due to the breach of duty of a vessel owner as a bailee for hire, on the ground that the statute gave exemption only to the owner "as carrier".

The *Wheeler* case was expressly approved by the Circuit Court of Appeals for the Second Circuit in *La Bourgogne*, 144 F. 781, 786. The latter case then came to this Court "on writ and cross-writ of certiorari" (210 U. S. 95). One of the points raised by the shipowner in its petition was that the Circuit Court of Appeals erred

in following the *Wheeler* case. The shipowner-petitioner gave much space in its brief to discussing that subject. Although this Court did not discuss the subject at length in its opinion (210 U. S. 95), it affirmed the decree of the Circuit Court of Appeals and it did say in its opinion, at page 141, that it had not overlooked these points, but had considered them all.

This analysis of the statutes demonstrates that when Congress has given exemption to vessels, carriers, masters, or shipowners, it has used words carefully to indicate exactly to whom and to what liabilities it has given an exemption. Here the Court is asked to extend the exemption of fire, granted to "owners" by the Fire Statute, to a contract made by a master, as master, and, not as agent of the owner, and, further, to take away from cargo owners the lien, or *in rem* liability of the vessel, which the Maritime law imposes for the breach of such a contract, although the statute contains no words indicating that Congress ever had any such intention. We submit that the reasoning in *Wheeler v. Oceanic Steam Nav. Co.*, 125 N. Y. 155, adopted in *La Bourgogne*, *supra*, is conclusive against such an extension. There the Court said (p. 160):

"The liability of the carrier as such was well understood by the framers of the statute. It had long been settled so that no one could mistake it. By force of his public employment, he became an insurer of the property entrusted to his care, and liable for its loss, irrespective of the cause, unless from the act of God or the public enemy. But involved in this greater liability and absorbed by it was a lesser liability as bailee for hire; of no consequence while the greater liability existed, but surviving the destruction of that, so that when the carrier ceased to be liable as carrier, he yet remained liable as bailee" (125 N. Y. at p. 160).

So here, it was well understood by the members of Congress who enacted the law of March 3, 1851, especially those members from New England, the proponents of the statute, men brought up literally under the eyes of Mr. Justice Story and Judge Ware, that the liability of a ship *in rem* was quite a different thing from the liability of an owner *in personam* and that a master's bill of lading had a significance quite different from a carrier's bill of lading. Indeed, we submit that there is even less reason to extend the section of the statute relating to fire to a ship's liability, than there was to extend the statute relating to valuables so as to relieve those who operate ships from a bailee's liability.

That Congress in drawing up the Act of March 3, 1851, was, in fact, not unmindful of the *in rem* liability of a ship, as distinguished from the personal liability of a shipowner or operator, is also demonstrated by the careful wording employed in Section 5 of that Act (now 46 U. S. Code, Sec. 186, See Appendix A, at p. 45): After providing that a bareboat charterer shall be deemed an owner within the meaning of the Act, Congress was careful to specify that a "vessel, when so chartered, shall be liable in the same manner as if navigated by the owner thereof". In *The Barnstable*, 181 U. S. 464, this Court said at p. 468 that "the liability of the vessel for the negligence of the charterers is now fixed by statute in this country", citing the foregoing section.

In view of the foregoing, it is manifest that the extension by the Court below to the ship *in rem* of the exonerations granted by the Fire Statute to "owners" constitutes in reality an amendment of the Act. As we shall show below, this "judicial legislation" is wholly unjustified and is in defiance of well settled principles of the admiralty law.

**The Legal Right Here Sought to Be Enforced Is That
of Petitioners Against the Vessel Under a Master's
Contract Executed as Master and Not as Agent
for the Owner.**

A breach of a contract of affreightment occurring, as is here the case, after the goods have been shipped on board the vessel, creates a right *in rem* against the vessel. This is well settled by many decisions of this Court. See *Dupont v. Lance*, 19 How. 162, where this Court said (p. 168) :

"The right of the shipper to resort to the vessel for claims growing directly out of his contract of affreightment, has very long existed in the general maritime law. It is found asserted in a variety of forms in the Consulado, the most ancient and important of all the old codes of sea laws, (see Chap. 63, 106, 227, 254, 259) and the maxim that the ship is bound to the merchandise, and the merchandise to the ship, for the performance of the obligations created by the contract of affreightment, is a settled rule of our maritime law" (19 How. at pp. 168-9).

See also, *The Keokuk*, 9 Wall. 517, at p. 519; *The Belfast*, 7 Wall. 624, at p. 642; *The Eddy*, 5 Wall. 481, at p. 494; *The Delaware*, 14 Wall. 579, at p. 596; *The Maggie Hammond*, 76 U. S. 435, at p. 449; and *Krauss Bros. Lumber Co. v. Dimon S. S. Corp.*, 290 U. S. 117, at p. 121.

The law is the same when the ship is operated by a bareboat charterer who has entire control of the vessel. This Court so held in *Schooner Freeman v. Buckingham*, 18 How. 182. In that case this Court said (p. 189) :

"We are of opinion that, under our admiralty law, contracts of affreightment, entered into with the master, in good faith, and within the scope of his apparent authority as master, bind the vessel to the merchandise for the performance of such contracts,

wholly irrespective of the ownership of the vessel, and whether the master be the agent of the general or the special owner.

"* * * when the general owner intrusts the special owner with the entire control and employment of the ship, it is a just and reasonable implication of law that the general owner assents to the creation of liens binding upon his interest in the vessel, as security for the performance of contracts of affreightment made in the course of the lawful employment of the vessel" (18 How. at pp. 189, 190).

To similar effect see *The Seaboard*, 119 Fed. 375, at p. 376; *The Alert*, 61 Fed. 113, at p. 115; and the rulings of that eminent admiralty authority, Judge Addison Brown, in *The T. A. Goddard*, 12 Fed. 174, at p. 178. The principle has been consistently followed; the latest application is, we believe, the decision of Judge Leibell in *The Lafecom*, 1943 A. M. C. 572, at p. 576. It is also recognized and embodied in Section 5 of the Act of March 3, 1851, now 46 U. S. Code, Sec. 186. (See Appendix A, at p. 45.) The bills of lading in this case (Ex. 9—R. 30 A) on their face show that they were executed "For Master". The very purpose of execution in this form is to bind the vessel. Such a form is commonly used where the bills of lading are issued by a voyage or by a time charterer so as to make certain to the cargo owner the additional security of a maritime lien. As to its binding effect on the ship *in rem*, see, among others, *The Capitaine Fayre*, 10 F. (2d) 950, at pp. 960-1, 963; *The Poznań*, 276 Fed. 418, at p. 432; *The Themis*, 275 Fed. 254, at p. 263; and *The Esrom*, 272 Fed. 266, at pp. 269, 272, 273. See also *The Phebe*, Fed. Cases No. 11,064, discussed in detail at pages 24-25 and pages 31-32, *infra*.

In view of the foregoing, it is clear that there is no basis for the doubt which apparently lingered in the

mind of the Court below where Judge Hand wrote: "Whether, if the charterer were liable *in personam*, a lien would attach to the ship on the theory that a bareboat charterer is the owner *pro hac vice*, we need not say . . ." (R. 63-4). We submit that this failure to recognize the existence of your petitioners' maritime liens against the "Venice Maru" was one of the reasons which led to the erroneous conclusion reached below.

The principle that maritime liens binding on the vessel may arise while it is in the exclusive possession of a bareboat charterer is not confined to cargo damage cases. See for example, among others, *The Spartan*, 1 Ware 130, Fed. Cases No. 11,246; *The Artisan*, 9 Ben. 106, Fed. Cases No. 568; *The Samuel Ober*, 15 Fed. 621; *The International*, 30 Fed. 375; *The L. L. Lamb*, 31 Fed. 29; *The Gen. J. A. Dumont*, 158 Fed. 312, 314; and *The Chester*, 25 F. (2d) 908, 910, all cases upholding a maritime lien, or right *in rem* against the ship, for wages due seamen hired by a master who was not the servant of the vessel owner but who had been appointed by the bareboat charterer.

See also, *The Barnstable*, 181 U. S. 464, at p. 467.

In summary, it is clear that your petitioners by reason of the damage sustained by their cargo subsequent to its being loaded and while still on board the "Venice Maru", became vested with maritime liens, or rights *in rem*, against that vessel. We have shown at pages 8-9, 13-15, *supra*, that the Fire Statute does not in terms relieve a ship or a master from the breach of a master's contract. Notwithstanding the absence of words in the statute exempting the vessel from liability for fire, the Circuit Court of Appeals held that because the statute relieved the shipowner and the owner *pro hac vice* from liability *in personam*, it thereby relieved the vessel from liability *in rem*, i. e., divested your petitioners of their maritime

ties. As a reason for so holding, the Court said: "To say that an owner is completely exonerated although one may arrest his ship and sell it, is a contradiction in terms, unless we are to think of the ship as a legal person capable of wrongdoing" (R. 63). This statement, we submit, ignores the distinction drawn by Judge Ware in *The Phœbe*, 1 Ware 263, Fed. Cases 11,064 (Appendix C). In that case Judge Ware points out that a contract such as that involved here does not exist because of any agency vested in the master, but because by the custom of the sea, which for ages has been embodied in the Maritime law, the master has, as master, the right to make contracts binding on the vessel of which he is master. It is also well settled law that when an owner of a ship permits a ship to be operated by a shipmaster and such master enters into a contract of carriage, the vessel becomes "impliedly hypothecated to secure the performance of the contract", to use the words of the present Chief Justice in *Krauss Bros. Lumber Co. v. Dimon S. S. Corp.*, 290 U. S. 117, at p. 121, since once the cargo is laden on board, the ship itself "is made answerable for non-performance" (p. 121 of 290 U. S.). It also ignores the fact, there pointed out, that "this engagement of the vessel or its hypothecation" is a separate liability "as distinguished from the personal obligation of the owner" (p. 121 of 290 U. S.).

Thus on analysis, the reasoning employed by the Court below will be seen to strike at the foundation of the American concept of a maritime lien as being a *jus in re* and not merely a *jus ad rem*. This principle is long and firmly established as an integral part of our admiralty law. It was succinctly stated by Mr. Justice Grier in *The Yankee Blade*, 19 How. 82 (a cargo damage case), as follows (p. 89):

"The maritime 'privilege' or lien is adopted from the civil law, and imports a tacit hypothecation of the subject of it. It is a '*jus in re*', without actual

possession or any right of possession. It accompanies the property into the hands of a bona fide purchaser. It can be executed and divested only by a proceeding *in rem*. This sort of proceeding against personal property is unknown to the common law, and is peculiar to the process of courts of admiralty" (p. 89 of 19 How.).

The foregoing was quoted with approval by Mr. Justice Gray in *The Glide*, 167 U. S. 606, at p. 612, and more recently in *Osaka Shosen Kaisha v. Lumber Company*, 260 U. S. 496, at pp. 496-8. The fallacy of voiding the maritime lien because of lack of liability on the part of the owner is graphically illustrated by the fact that it can be enforced even after the ship has passed "into the hands of a bona fide purchaser". To like effect see also, among others, *Insurance Co. v. Baring*, 20 Wall. 159, 163; *The John G. Stevens*, 170 U. S. 113, 120; *Parson v. Cunningham*, 63 Fed. 132 (C. C. A. 1); and particularly the learned opinion of Mr. Justice Curtis in *The Young Mechanic*, 2 Curt. 404, Fed. Cases No. 18,180. After discussing the historical origin and the nature of maritime liens, Mr. Justice Curtis there said:

"It is not merely a privilege to resort to a particular form of action to recover a debt. The maritime law, following the Roman, distinguished between actions and privileges, and held that actions do not make hypothecations. Emerigon, *Con. à la Grosse*, c. 12, Sec. 1. It is an appropriation made by the law, of a particular thing, as security for a debt or claim; the law creating an innumbrance thereon, and vesting in the creditor, what we term a special property in the thing, which subsists from the moment when the debt or claim arises, and accompanies the thing even into the hands of a purchaser. * * * A right which enables a creditor to institute a suit, to take a thing from any one who may possess it, and subject it, by a sale, to the payment of his debt; which

so inheres in the thing as to accompany it into whosoever hands it may pass by a sale; which is not divested by a forfeiture or mortgage, or other incumbrance created by the debtor, can only be a *jus in re*, in contradistinction to a *jus ad rem*; or in contradistinction to a mere personal right or privilege. Though tacitly created by the law, and to be executed only by the aid of a court of justice, and resulting in a judicial sale, it is as really a property in the thing as the right of a pledgee or the lien of a bailee for work. The distinction between a *jus in re* and a *jus ad rem* was familiar to lawyers of the middle ages, and is said then to have first come into practical use, as the basis of the division of rights into real and personal. Saund. Intro. to Just. p. 49. A '*jus in re*' is a right, or property in a thing, valid as against all mankind. * * * For it has been settled so long, that we know not its beginning, that a suit in the admiralty to enforce and execute a lien, is not an action against any particular person to compel him to do or forbear any thing; but a claim against all mankind; a suit in rem, asserting the claim of the libellant to the thing, as against all the world. * * * But if, as I think, it is a real and vested interest in the thing, constituting an incumbrance placed thereon by operation of law, to be executed by a judicial process against the thing, to which no person is made a party, save by his voluntary intervention and claim, then *the inability to maintain a suit against the administrator, and the incapacity to make any attachment of the property of the deceased in such a suit*, though they may amount to infirmities in the remedy when pursued in the state courts, *do not affect the right of the creditor, nor his remedy in the admiralty*" (30 Fed. Cases at pp. 875-6). (Italics ours.)

The narrow construction placed by the Court below upon your petitioners' rights *in rem* as being measured

by and dependent upon the existence of an *in personam* liability of the vessel owner plainly conflicts with the concept of the nature of maritime liens as set forth in the foregoing authorities; and the conclusion reached by the Court below squarely conflicts with the decision in *The Young Mechanic, supra*.*

The attack made below upon the nature of a maritime lien for cargo damage and upon the opinion of the Circuit Court of Appeals for the Fifth Circuit in *The Etna Maru*, 33 F. (2d) 232, because the latter Court adhered to the well-settled principle of maritime law as to the nature of rights *in rem*, falls within the category of similar attacks against the maritime law which brought forth the well known article by the late Honorable Charles M. Hough entitled "Admiralty Jurisdiction—of Late Years", 37 (March, 1924) Harvard Law Review, p. 529.** Judge Hough, as an old practitioner of the Admiralty, came to its defense with vigor. He took exception to "the tone of mockery displayed in every reference to the doctrine of a lien attaching regardless of the shipowner's personal liability" (p. 543). That article was indeed Judge Hough's reply to those whom he considered as unsympathetic critics of the just and equitable principles of the admiralty, to whose maintenance he had devoted his life. Throughout his article, time and again,

* *The Young Mechanic, supra*, has frequently been cited with approval not merely by the lower Federal Courts, but also by this Court. See *Vandewater v. Mills (The Yankee Blade)*, 19 How. 82, 90; *The Kalorama*, 10 Wall. 204, 212; *Ins. Co. v. Baring*, 20 Wall. 159, 163; *The J. E. Rumbell*, 148 U. S. 1, 10; *Moran v. Sturges*, 154 U. S. 256, 282; *The John G. Stevens*, 170 U. S. 113, 117; and *The Carlos F. Rosas*, 177 U. S. 655, 666.

** See particularly p. 541, where Judge Hough said: "It is the safest of assertions that the mainspring of effective admiralty power is the maritime lien. The American concept of that *jus in re*, as a proprietary interest in an offending *res* arising contemporaneously with the cause of action, is elementary learning, resting on the authority of classical decisions of the Supreme Court. In the whole maritime anthology of that Court, no single flower is so important."

he mentions "the Admiralty tradition", which he feared was in process of destruction. He recalled that this tradition was introduced in the decisions of this Court by Story, J., and was kept alive in this Court by a series of distinguished judges. For Judge Hough the matter discussed was personal as well as legal. For him the memory and life work of Story, Curtis, Clifford, Grier, Blatchford, Swaine, Taney, Gray and Henry Billings Brown was worthy of defense. It was the memory and achievement of these men which needed defense, as well as the principle involved. The question now presented to this Court is, therefore, of deeper significance than the narrow one couched in legal language, which we submitted in our petition. It is: Is this Court to discard the Admiralty tradition?

The ruling of the Circuit Court of Appeals herein rests on two legal premises, namely (1) that the ship's liability *in rem* is to be measured by, and is only co-extensive with, the owner's liability *in personam*, and (2) that personification of the ship as the basis for the creation and enforcement of maritime liens, apart from, and even in the absence of, any liability on the part of her owner, "is a bit of mythology" (R. 63). We submit that both of these propositions are squarely contrary to the well settled principles of American admiralty law.

I.

The liability of the ship created by a master's bill of lading is wholly separate and independent of any liability on the part of her owner.

We have already shown (p. 3) that the bills of lading covering the cargo loaded on board the "Venice Maru" were executed by the bareboat charterer "For Master".

(See Exhibit 9, R. 30 A.) The error into which the Court Below fell apparently arose in part from its failure to give weight to this fact. However, because of the form in which the bills of lading were executed, there can be no question but that the "Venice Maru" was thereby bound *in rem*; and it is equally well settled that such liability, so created, is a distinct and separate liability, entirely unrelated to and independent of any liability on the part of her owner or bareboat charterer. Both the foregoing propositions are well settled in the general maritime law as adopted into our American admiralty law as is most clearly shown by Judge Ware's scholarly opinion in *The Phebe*, 1 Ware 263, Fed. Cases, No. 11,064 (See Appendix C, p. 48). That case also involved damage to cargo; there, as is the situation in the case at bar, the owner had let his ship under bareboat charter and the suit was in a master's bill of lading. After a careful review of the authorities and the principles on which they rested, Judge Ware held that the owner was discharged of all liability for the breach of the contracts involved because he had not authorized the master to bind him, but that the vessel was, nevertheless, liable *in rem* for such breach. Judge Ware there pointed out:

"This rule, by which the vessel is bound *in specie* for the acts of the master, is not derived from the civil law, but has its origin in the maritime usages of the middle ages; and it is to these usages that we must look to ascertain its true character. * * *

* * * Thus we find, when the principle is traced back to its source, that *it is by no means correct to say that the liability of the vessel is merely collateral or accessory to that of the owner.* On the contrary, in the origin of the custom the primary liability was upon the vessel, and that of the owner was not personal but merely incidental to his ownership; from which he was discharged either by the loss of the

vessel or by abandoning it to the creditor" (19 Fed. Cases at pp. 420, 421).* (Italics ours.)

In *Schooner Freeman v. Buckingham*, 18 How. 182, Mr. Justice Curtis, speaking for this Court, said at p. 189:

"In the case of *The Phœbe*, Ware's R. 263, Judge Ware has traced the power of the master to bind the vessel by contracts of affreightment to the maritime usages of the middle ages. So far as respects such contracts made by the master in the usual course of the employment of the vessel, and entered into with a party who has no notice of any restriction upon that apparent authority, those maritime usages may safely be considered to make part of our law; ***."

That the *in rem* liability of a ship for the breach of a contract of carriage binding on it is to be "distinguished from the personal obligation" of the owner was also pointed out by the present Chief Justice in *Krauss Bros. Lumber Co. v. Dimon S. S. Corp.*, 290 U. S. 117, at p. 121.

The bills of lading of the "Venice Maru" were in the usual form of a master's bill of lading. They were all signed "For Master". It follows that the contracts here involved are effective as master's contracts and bound the ship. The bills of lading by their terms contemplated a liability on the part of the vessel as well as on the part of the carrier. They specifically provide that upon delivery of the cargo to the consignee, "the vessel's and the carrier's liability shall cease" (R. 30-A). There has never been any suggestion that there has ever been any liability under these contracts on the part of the owner; Kawasaki Zosenjo, since, concededly, Kawasaki Zosenjo had nothing to do with the operation or control of the "Venice Maru" (Find-

* The purpose of the Act of March 3, 1851, was to incorporate into our admiralty law this ancient principle of the general maritime law that a vessel owner can obtain release of his liability *in personam* by the surrender of the vessel. See, in particular, *The Scotland*, 105 U. S. 24, at p. 28.

ing 1, R. 40). How then can it be said that a statute which protects a *shipowner* from loss by fire operates to protect a master and the vessel hypotheeated as security for his contract from losses by fire when such statute does not mention the master or the ship?

II.

As a matter of law, it is well established that a vessel may be liable for loss or damage when the owner is not liable.

The proposition stated in the heading is well illustrated by *The Barnstable*, 181 U. S. 464, an action *in rem* for collision damage inflicted as a result of negligent navigation by the part of her officers and crew who had been hired by the bareboat charterer. Obviously, since they were not the agents or servants of her owner, the latter was not liable for their acts. In holding, however, that the vessel itself was liable *in rem* for the damage so caused, this Court, through Mr. Justice Brown, said at p. 467:

"Whatever may be the English rule with respect to the liability of a vessel for damages occasioned by the neglect of the charterer, as to which there appears to be some doubt, *The Ticonderoga*, Swabey, 215; *The Lemington*, 2 Asp. Mar. Law Ca. 475; *The Ruby Queen*, Lush. 266; *The Tasmania*, 13 P. D. 110; *The Parlement Belge*, 5 P. D. 197; *The Castlegate* (1893), App. Ca. 38, 52; *The Utopia* (1893), App. Cas. 492, the law in this country is entirely well settled, that the ship itself is to be treated in some sense as a principal, and as personally liable for the negligence of any one who is lawfully in possession of her, whether as owner or charterer. *The Little Charles*, 1 Broek. 347, 354" (p. 467 of 181 U. S.).

Conversely, this Court decided in *Homer Ramsdell Transportation Co. v. Compagnie Generale Transatlantique*, 182 U. S. 406, that in that case the owner was not liable although its vessel would have been liable if sued *in rem*.

That there is a maritime liability *in rem*, distinct from a liability *in personam*, was also recognized by this Court in *The China*, 7 Wall. 53. In that case this Court stated almost the same question as that now presented before this Court. The Court stated it as follows (p. 67):

"The argument for the appellants proceeds upon the general legal principle that one shall not be liable for the tort of another imposed upon him by the law, and who is, therefore, not his servant or agent?" (7 Wall. at p. 67).

This Court, in rejecting this argument, gave the following reason to support its position (p. 68):

"The maritime law *as to the position and powers of the master, and the responsibility of the vessel*, is not derived from the civil law of master and servant, nor from the common law. It had its source in the commercial usages and jurisprudence of the middle ages. *Originally, the primary liability was upon the vessel, and that of the owner was not personal, but merely incidental to his ownership*, from which he was discharged either by the loss of the vessel or by abandoning it to the creditors. But while the law limited the creditor to this part of the owner's property, it gave him a lien or privilege against it in preference to other creditors" (7 Wall. at p. 68). (Italics ours.)

It cites *The Phebe*, 1 Ware 263, Fed. Cases No. 11,064, and *The Creole*, 2 Wallace, Jr. 485, Fed. Cases No. 13,033, as authorities.

Here, as there, it is "the responsibility of the vessel" with which we are concerned. It is not the responsibility of the owner. The responsibility of the vessel "is not derived from the civil law of master and servant, nor from the common law". "It had its source in the commercial usages and jurisprudence of the middle ages". The Court was well fortified in the opinions of Judge Ware in *The Phœbe*,^{*} *supra*, and of Mr. Justice Grier in *The Creole*, *supra*, in making this statement. In *The Creole*, Mr. Justice Grier said (p. 507 of 22 Fed. Cas.):

"Thus far I have considered the question on the principles peculiar to the common or civil law relating to master and servant, rather than those of the maritime law. The proceeding in this case is *in rem*, for a maritime tort. The rights and remedies of the libellants are to be tested by the principles of that law, unaffected by any statutory provisions. A proceeding *in rem*, in admiralty, is not a mere attachment to compel the appearance of the owners, as in civil law proceedings, and attachments under the custom of London, which are not proceedings *in rem* in the admiralty sense of the phrase. The court of admiralty proceeds on the principle that *the vessel itself is hypothecated by the contracts*, as well as the obligations arising *ex delicto* of the master, and is herself liable for all maritime liens. The owners and others interested, are allowed to intervene *pro interesse suo*; and for convenience of trade and commerce, are permitted to release the vessel, by substituting their stipulation and security in its place. *But the property attached is, in all cases, treated as the debtor, and primarily liable.*

By the maritime law, the power of the master to bind the owners by his obligations *ex delicto*, did not extend beyond the tacit hypothecation of the property in his possession. By surrendering the

* See Appendix C.

hypothecated vessel, the owners escape further liability, or, if they intervene, cannot be made liable beyond her value.

These principles which prescribe the powers of the master of a vessel, are not drawn from the doctrine of the civil law concerning the relation of master and servant, but had their origin in the maritime usages of the middle ages. By these the ship was bound to the merchandise and the merchandise to the ship; and both are bound for the mariners' wages, 'even to the last nail of the ship'. By these the master was authorized to bind the vessel by bottomry. And by these the vessel becomes hypothecated for the obligations of the master arising *ex delicto*, and is herself treated as the debtor or offender. Hence, also, the vessel became bound to those who dealt with the master, whether he was appointed to act as their agent, or the ship was let to him on charter-party. It is unnecessary to make an array of the various European writers on this subject; as authority for these statements, I refer for them to the opinions of Judge Ware, in the cases of *Poland v. The Spartan* (Case No. 11,246); *The Rebrea* (Id. 11,619) and *The Phebe* (Id. 11,064), in which the origin and principles of maritime law affecting the liability of vessels for the contracts of the master, are treated with the ability and research which distinguished that judge" (p. 507 of 22 Fed. Cas.). (Italics ours.)

Thus it appears that when the bills of lading in the case at bar were executed "For Master", the "Venice Maru" became hypothecated for the performance of the contract. No personal contract in any way binding upon the vessel owner was entered into as a result. The vessel, not the owner, was the debtor. Indeed, this was so clearly the law, that even before there was any Act of 1851 limiting the shipowner's liability, the shipper who held a master's contract could not sue the owners for any damage which

he might sustain while his goods were in the vessel's custody unless the owner had assented to the contract. There is nothing in the Act of March 3, 1851, which indicates that Congress intended to interfere with or change that liability of a master or of a vessel hypothesized for the proper performance of the master's contract. It did not provide in that Act that a contract made by the master of a vessel should be binding upon the owner of the vessel, nor did it provide that the obligations imposed on the vessel by the contract of the master as it bound the vessel should in any manner be lessened. It is not to be supposed that Congress did not know what it was about. In this connection, it should be noted that Section 6 of the Act of 1851 (now 46 U. S. Code, Sec. 187) specifically provides that "nothing in the preceding sections shall be construed to take away or affect the remedy to which any party may be entitled against the master, officers or mariners . . ." while in the last part of Section 5 (now 46 U. S. Code, Sec. 186) Congress had taken care to provide that in cases involving a bareboat charter the *in rem* liability of the vessel should nevertheless continue.

In the Harter Act (Act of February 13, 1893, c. 105, 27 Stat. 445; now 46 U. S. Code Secs. 190-196; Appendix B), Congress dealt with a similar problem. There it expressly forbade "the manager, agent, master, or owner of any vessel transporting merchandise or property from or between ports of the United States and foreign ports, to insert in any bill of lading or shipping document any clause, covenant, or agreement whereby *it*, he, or they shall be relieved from liability for loss or damage arising from negligence, fault, or failure in . . . proper delivery of any and all lawful merchandise or property committed to *it* or their charge" (italics ours) (46 U. S. Code, §190). The use of the words "it" and "its" in this statute can only mean that Congress dealt with the vessel's liability as well as that of the owner. A mere reading of this statute should remove any notion that Congress was

unable to express itself intelligently on this important subject. The foregoing constitutes the first section of the Harter Act (Appendix B). The second section of that Act, which is in almost the same language, differs from the first section in that the prohibition is directed to "the obligations of the owner or owners of said vessel to exercise due diligence to properly equip, man and provision and outfit said vessel", etc. (46 U. S. Code, 191). And in Section 3 of that Act where Congress conferred exemptions, it took care to specify: "neither the vessel, her owner or owners, agent or charterers" (46 U. S. Code, See, 192). A mere reading of these sections demonstrates beyond doubt that Congress realized the difference between a vessel's and an owner's liability as defined by this Court in *The China*, by Mr. Justice Grier in *The Creole*, and by Judge Ware in *The Phebe*, all *supra*.

We now turn to the "high authority of Judge Ware",* upon whose research Mr. Justice Grier in *The Creole* stated he relied.

The Phebe, 1 Ware 263, Fed. Cas. No. 11,064, cited both by this Court in *The China* and by Mr. Justice Grier in *The Creole*, was a case where a vessel, owned by one person, was operated by another, under a bareboat charter, as was the case here. Damages to cargo had been sustained. The contention was made that there was no personal liability on the owner, hence his ship could not be liable for these damages. Judge Ware held that, although this might be true if the applicable law were the common or civil law, it was not true in the case before him, because the applicable law was the Maritime law. Counsel for cargo rested their argument on two grounds: (1) an implied agency; and (2) the rule of the Maritime law that permitted the master to bind the ship by virtue

* Benedict, J., in *The Kate Tremaine*, 5 Ben. 60, F. C. No. 7622, 14 F. C. at p. 146.

of his position as master rather than as agent of the owner. Judge Ware rejected the first contention, but adopted the second. (See Appendix C, p. 48.)

After rejecting any liability based upon the common law and civil law rules as to agency, Judge Ware carefully reviewed the Maritime codes and authorities, and demonstrated that the master's authority to enter into a contract binding the ship is created by the Maritime law itself and that "it is by no means correct to say that the liability of the vessel is merely collateral or accessory to that of the owner." He shows that it is distinct from that of the owner and exists because the ship has been placed in maritime trade, and that for the convenience of trade and to insure the performance of the contracts of the master the Maritime law gives the merchant the legal right to look to the ship and freight for the performance of the contract. He points out that the right of the seamen to look to the ship and freight for their wages rests upon the same principle — see his decision in *The Spartan*, 1 Ware 130; Fed. Case No. 11,246. In that case, but for this beneficent principle of the Maritime law, the seamen would have remained unpaid. See also in particular *The Chester*, 25 F. (2) 908, 910, where a like situation was involved.

Mr. Justice Curtis, speaking for this Court, in *Schuyler Freeman v. Buckingham*, 18 How. 182, at page 189, stated that the principles laid down by Judge Ware in *The Phebe*, *supra*, "may safely be considered to make part of our law". Similarly, Judge Ware's decision was specifically approved by Mr. Justice Grier in *The Creole*, *supra*. Since the language in *The Creole* was used almost verbatim by this Court in *The China*, *supra*, and this Court cites *The Phebe* as authority for its own statement of the law in *The China*, we submit that the question is not an open one, but has in fact been decided by this Court in *The China*, *supra*.

As we have said above, in *Homer Ramsdell Trans. Co. v. Compagnie Generale Transatlantique*, 182 U. S. 406, this Court expressly held that, although a vessel would have been liable *in rem* under the facts of that case, the owner was not liable *in personam*. The incidence of ownership imposed no liability upon the owner. The *Homer Ramsdell* case dealt with the personal liability of the shipowner for the negligence of a compulsory pilot and held that there was no personal liability for such negligence, although in *The China, supra*, it had been held that in such a case the vessel would be liable *in rem*. It cited *Ralli v. Troop*, 157 U. S. 386; *The John G. Stevens*, 170 U. S. 113; and *The Barnstable*, 181 U. S. 464; and quoted (p. 413 of 182 U. S.) the following language from *Ralli v. Troop*:

"That decision [*The China*] proceeded, not upon any authority or agency of the pilot, derived from the civil law of master and servant, or from the common law, as the representative of the owners of the ship and cargo; * * * but upon a distinct principle of the maritime law, namely, that the vessel, in whosoever hands she lawfully is, is herself considered as the wrongdoer, liable for the tort, and subject to a maritime lien for the damages." (*Ralli v. Troop*, 157 U. S. at p. 402.) (Italics ours.)

See also *Schooner Freeman v. Buckingham*, 18 How. 182; *The Barnstable*, 181 U. S. 464; *The Yankee Blade*, 19 How. 82, 89.

And in the *Homer Ramsdell* case, the Court also said:

"There is no occasion to refer further to the English cases in admiralty, because in England it is held that the ship is not responsible in admiralty, where the owner would not be at common law, differing in this respect from our own decisions." (182 U. S. at p. 413.)

We submit that the question taken up by this Court by its writ of certiorari should be answered by stating that

the Fire Statute, 46 U. S. Code, §182, does not grant any relief in cases *in rem* for breaches of the vessel's contracts of affreightment.

III.

Congress has repeatedly provided that a proceeding *in rem* in accordance with the rule of the Maritime Law shall be used in enforcing laws relating to ships. It has recently provided that the same procedure shall be used to enforce laws relating to airplanes. A decision of this Court affirming the decision below, which declared that a thing may not be guilty when its owner is innocent, may seriously affect the enforcement of these statutes.

As we have shown under the preceding heading, the Admiralty procedure of arrest of a vessel, holding her responsible for breach of a contract or for a maritime tort, is ancient. It was adopted because the common law procedure proved ineffectual. It is stated that Edward III organized the Admiralty courts in England because of his inability to deal effectively with piracy by using the process of the common law courts. See introduction by Marsden to *Select Pleas in the Court of Admiralty*, Selden Soc., Vol. I, pp. xiv, *et seq.* See also "Is the Crime of Piracy Obsolete?", 38 Harvard Law Review 334, 340. Arrest of vessels in suits *in rem* continued in the English Admiralty court until the court was abolished in the time of James I, as a result of the fall of Lord Bacon. For an interesting account of the controversy between Bacon and Coke as it affected English Admiralty law, see *Benedict on Admiralty*, 4th Edition, Chapter VI, pp. 38, *et seq.* The jurisdiction was not revived in England until 1840, when the first of the so-called Admiralty Court Acts was adopted, 3 & 4 Vict., c. 65. This Act was followed by others, all tending to give that Court broader jurisdiction

of matters of title and mortgage of ships, salvage, towage and necessaries, building, equipping and repairing ships, claims on bills of lading and for damage to goods, questions of account between part owners, claims for life salvage and seamen's wages, including master's wages, and jurisdiction of any claim for damage done by any ship (*Benedict on Admiralty*, 4th Ed., pp. 56, 57).

The American Admiralty courts functioned almost from the first days of settlement of the Colonies. See *Benedict*, 4th Ed., pp. 60, *et seq.* The difference between the law in England and that in America grew up because of this difference in the history of the Courts. The difference was commented upon by this Court in *Homer Ramsdell Co. v. Com. Gen. Trans.*, 182 U. S. 406, at p. 413:

"There is no occasion to refer further to the English cases in admiralty, because in England it is held that the ship is not responsible in admiralty, where the owner would not be at common law, differing in this respect from our own decisions. *The China*, 7 Wall. 53; *Ralli v. Troop*, (1894) 157 U. S. 386, 402, 420; *The John G. Stevens*, (1898) 170 U. S. 113, 120-122; *The Barnstable*, (1901) 181 U. S. 464."

Shortly after the founding of the Government of the United States, our Government also found it useful to provide by statute that the Admiralty process should be used to enforce forfeitures. See *The Palmyra*, 12 Wheaton 1. In that case at page 14 (12 Wheaton) Mr. Justice Story commented upon the distinction between a proceeding at common law and one in admiralty, and emphasized that under the piracy statute "the offence is attached primarily to the thing". He significantly adds: "The same principle applies to proceedings *in rem*, on seizures in the admiralty".

Seizures under revenue laws are also sustained by the same doctrine. — *The Apollon*, 9 Wheaton 362.

In *The Brig Malek Adhel*, 2 Howard 210, another piracy case, the master had engaged in piracy, but the owners of the brig were innocent. Nevertheless, the vessel was condemned. This Court, speaking through Mr. Justice Story, said (p. 233):

"It is not an uncommon course in the admiralty, acting under the law of nations, to treat the vessel in which or by which, or by the master or crew thereof, a wrong or offence has been done as the offender, without any regard whatsoever to the personal misconduct or responsibility of the owner thereof. And this is done from the necessity of the case, as the only adequate means of suppressing the offence or wrong, or insuring an indemnity to the injured party" (2 How. at p. 233).

As recently as the case of *The Scow 4-S.*, 250 U. S. 269, this Court, in enforcing statutes of Congress prohibiting dumping of refuse in the harbor of New York, said (p. 272):

"The act of Congress here in question imposes a direct liability upon the vessel for the pecuniary penalties prescribed, and declares that it may be proceeded against summarily by libel in any district court of the United States having jurisdiction thereof. This precludes the idea that the proceeding by libel is to be deferred to await the possibly slow course of criminal proceedings against the persons individually responsible. It treats the offending vessel as a guilty thing, *upon the familiar principle of the maritime law*, and permits a proceeding against her in any court of admiralty having jurisdiction thereof—meaning any court within whose jurisdiction she may be found" (250 U. S. at p. 272). (Italics ours.)

And more recently Congress extended the same principle to airplanes. See 49 U. S. Code, Section 181, sub. b,

as amended June 30, 1934, Chap. 656, Sec. 2, 48 Stat. 1116, June 23, 1938, Chap. 601, Sec. 1107 (i) (9), 52 Stat. 1029, where Congress provided that airplanes could only enter the United States at certain designated places; that after so entering they must conform to the immigration and customs regulations; and that:

*"In case the violation is by the owner or person in command of the aircraft, the penalty shall be a lien against the aircraft. Any civil penalty imposed under this section may be collected by proceedings *in personam* against the person subject to the penalty and/or *in case the penalty is a lien, by proceedings *in rem* against the aircraft.* Such proceedings shall conform as nearly as may be to civil suits in admiralty; except that either party may demand trial by jury of any issue of fact, if the value in controversy exceeds \$20, and facts so tried shall not be re-examined other than in accordance with the rule of the common law. The fact that in a libel *in rem* the seizure is made at a place not upon the high seas or navigable waters of the United States, shall not be held in any way to limit the requirement of the conformity of the proceedings to civil suits *in rem* in admiralty." * * * (Sec. 181, sub. b, Title 49, U. S. Code.) (Italics ours.)*

The leading case which has arisen under this statute is that of *United States v. Batre*, 69 F. (2d) 673 (C. C. A. 9). In that case an airplane entered the United States and landed at Florence, Arizona, which had not been designated as a port of entry by the Secretary of the Treasury, and, therefore, the airplane had violated the provisions of the Act and a lien attached to her. To enforce the lien, the United States filed a libel against the airplane. The airplane was claimed by Alma R. Batre, who was the holder of a chattel mortgage on the airplane and who was in no way concerned with the violation of the law. The defense was that the owner of the plane was innocent

and that the inanimate plane could not be guilty of entering the United States intentionally contrary to the law, and that, therefore, the plane was not liable to confiscation. The Court reviewed the various decisions on the question of forfeiture and, after citing *The Palmyra*, 12 Wheaton 1, and quoting at length from the *Brig Malek Adhel*, 2 How. 210, held that the circumstance that the claimant was innocent was irrelevant. The Court significantly added (p. 676):

"Had the Congress desired an exemption from penalty under this act to apply to innocent third parties, it would have been so stated, as has been done in other enactments" (69 F. (2d) at p. 676).

It may also be said here, that had Congress desired an exemption from "liability" for fire to apply to the contracts of masters, or from "*in rem* liability", it would have so stated.

By the terms of the airplane statute, "the act of the person in charge of the plane" is sufficient to impose a lien upon the airplane, just as the act of a master, the person in charge of a ship, is sufficient to impose a lien on a ship. In short, Congress in this statute adopted the whole of the Admiralty doctrine.

In *Goldsmith-Grant Co. v. United States*, 254 U. S. 505, 511, this Court held that, because Section 3450 of the Revised Statutes provided that, *inter alia*, every carriage, or other conveyance whatsoever, used in the removal, or for the deposit and concealment, of goods removed, deposited or concealed with intent to defraud the United States of any tax thereon, shall be forfeited, an automobile so used by a person who did not own the car, because he had it on credit from an owner who retained the title, is subject to libel and forfeiture, although the owner was without notice of the forbidden use. The same principle was declared in *United States v. Stowell*, 133 U. S. 4; and in various other cases.

In *The Little Charles*, 1 Broek, 347, F. C. No. 15,612, Chief Justice Marshall held that a vessel was liable to forfeiture when she departs from a port of the United States in violation of the Embargo Act, and that this is true, irrespective of whether the violation was with or without the authority of the owner. See also *The Mincola-Machado v. U. S.*, 16 F. (2d) 844 (C. C. A. 1).

In *U. S. v. Hall*, 9 Am. Law Reg. 232, Fed. Cases No. 15,281, the principle was invoked to prevent private parties from carrying mail in competition with the Government.

See also *United States v. One Ford Coupe*, 272 U. S., 321, 326; where the same principle was invoked in connection with the prohibition law.

And in *The Pilot*, 43 F. (2d) 491, the Circuit Court of Appeals for the Fourth Circuit said (p. 493):

"Innocence of the owner is not a defence to forfeiture *in rem* incurred under the customs and navigation laws. There is no disagreement among the courts on this proposition, and the law on this point has been definitely settled. *United States v. One Saxon Automobile, et al.* (C. C. A.), 257 F. 251; *United States v. Menery* (C. C. A.), 254 F. 287, 5 A. L. R. 211; *Logan v. United States* (C. C. A.), 260 F. 746; *United States v. One Black Horse* (D. C.), 129 F. 167; *The Esther M. Rapple*, 7 F. (2d) 545; *The Mincola*, 16 F. (2d) 844; *Dobbin's Distillery v. United States*, 96 U. S. 395; *United States v. Stowell*, 133 U. S. 1; *Goldsmith, Jr. Grant Co. v. United States*, 254 U. S. 505. See, also, *United States v. Brig Malek Adhel*, 2 How. 210; *Fan Oster v. Kansas*, 272 U. S. 465" (p. 493 of 43 F. (2d)).

So also in *Fan Oster v. Kansas*, 272 U. S. 465, this Court, speaking through Mr. Justice Stone, said (p. 467):

"It is not unknown or indeed uncommon for the

law to visit upon the owner of property the unpleasant consequences of the unauthorized action of one to whom he has entrusted it. Much of the jurisdiction in admiralty *** are familiar examples" (p. 467 of 272 U. S.).

See also *The Three Friends*, 166 U. S. 1, where this Court enforced the same doctrine to prevent filibustering.

It is submitted that to sustain the proposition that *in rem* liability is dependent upon *in personam* liability of the owner of the *res*, would undermine not only the Maritime law, but would seriously affect those laws of the United States regulating air and maritime transportation, as well as revenue and embargo laws, laws against unlawful manufacture and trade, and laws prohibiting the dumping of refuse in harbors. As was well said by this Court in the case of *The Scow 6-S.*, 250 U. S. 269, at p. 272, while dealing with the last mentioned class of case, without the process *in rem* the Government would be forced to resort to the "slow course of criminal proceedings against the persons individually responsible".

Conclusion.

In summary, we submit (1) that since the bills of lading were signed "For Master", they clearly bound the "Venice Maru" *in rem* and their admitted breach created maritime liens enforceable against the vessel irrespective of its ownership; (2) that under well-settled authority the *in rem* liability so created was wholly separate, distinct and independent of any *in personam* liability on the part of the vessel owner or charterer; (3) that the Fire Statute by its terms applies only to the liability of the vessel owner, i. e., *in personam* liability; and (4) that the unusual exemption granted by the Fire Statute to the "owner" only should not by judicial construction be extended beyond the wording of the statute to divest mari-

time liens which constitute a *jus in re*; particularly since Congress, in the other sections of the Act of March 3, 1851, and in subsequent statutes, has taken care to specify with particularity the recipients of all statutory exemptions granted by it and did not elect to relieve a vessel from this liability, *i. e.*, its liability for fire, until 1936, when it passed the Carriage of Goods by Sea Act two years after the causes of action here involved arose, and then only in limited trades.

Wherefore, the decree below discharging the "Venice Maru" from liability should be modified so as to permit your petitioners to recover from the value of that vessel in respect of their claims for cargo damage, together with interest and costs.

Respectfully submitted,

D. ROGER ENGLAR,
T. CATESBY JONES,
EZRA G. BENEDICT FOX,
THOMAS H. MIDDLETON,
Proctors for Petitioners.

September 25, 1943.

Appendix A.

Act of March 3, 1851.

(9 Stat. 635.)

Chap. XLIII.—An Act to limit the Liability of Ship- Owners, and for other Purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That no owner or owners of any ship or vessel shall be subject or liable to answer for or make good to any one or more person or persons any loss or damage which may happen to any goods or merchandise whatsoever, which shall be shipped, taken in, or put on board any such ship or vessel, by reason or by means of any fire happening to or on board the said ship or vessel, unless such fire is caused by the design or neglect of such owner or owners: Provided, That nothing in this act contained shall prevent the parties from making such contract as they please, extending or limiting the liability of ship-owners.

[As carried over into the U. S. Code (See, 182 of Title 46), the foregoing section reads as follows:

“See, 182: *Loss by fire.* No owner of any vessel shall be liable to answer for or make good to any person any loss or damage, which may happen to any merchandise whatsoever, which shall be shipped, taken in, or put on board any such vessel, by reason or by means of any fire happening to or on board the vessel, unless such fire is caused by the design or neglect of such owner.”]

• See. 2: And be it further enacted, That if any shipper or shippers of platina, gold, gold dust, silver, bullion, or other precious metals, coins, jewelry, bills of any bank or public body, diamonds or other precious stones, shall lade

the same on board of any ship or vessel, without, at the time of such lading, giving to the master, agent, owner or owners of the ship or vessel receiving the same, a note in writing of the true character and value thereof, and having the same entered on the bill of lading therefor, the master and owner or owners of the said vessel shall not be liable, as carriers thereof, in any form or manner; nor shall any such master or owners be liable for any such valuable goods beyond the value and according to the character thereof so notified and entered.

[As carried over into the U. S. Code (See, 181 of Title 46), the foregoing section reads as follows:

"Sec. 181. *Liability of masters as carriers.* If any shipper of platinum, gold, gold dust, silver, bullion, or other precious metals, coins, jewelry, bills of any bank or public body, diamonds, or other precious stones, or any gold or silver in a manufactured or unmanufactured state, watches, clocks, or timepieces of any description, trinkets, orders, notes, or securities for payment of money, stamps, maps, writings, title deeds, printings, engravings, pictures, gold or silver plate or plated articles, glass, china, silks in a manufactured or unmanufactured state, and whether wrought up or not wrought up with any other material, furs, or lace, or any of them, contained in any parcel, or package, or trunk, shall lade the same as freight or baggage, on any vessel, without at the time of such lading giving to the master, clerk, agent, or owner of such vessel receiving the same a written notice of the true character and value thereof, and having the same entered on the bill of lading therefor, the master and owner of such vessel shall not be liable as carriers thereof in any form or manner; nor shall any such master or owner be liable for any such goods beyond the value and according to the character thereof so notified and entered."]

Sec. 5. And be it further enacted, That the charterer or charterers of any ship or vessel, in case he or they shall man, victual and navigate such vessel at his or their own expense, or by his or their own procurement, shall be deemed the owner or owners of such vessel within the meaning of this act; and such ship or vessel, when so chartered, shall be liable in the same manner as if navigated by the owner or owners thereof.

[As carried over into the U. S. Code (See, 186 of Title 46), the foregoing section reads as follows:

"See 186. *Charterer may be deemed owner.* The charterer of any vessel, in case he shall man, victual, and navigate such vessel at his own expense, or by his own procurement, shall be deemed the owner of such vessel within the meaning of the provisions of this chapter relating to the limitation of the liability of the owners of vessels; and such vessel, when so chartered, shall be liable in the same manner as if navigated by the owner thereof."

Sec. 6. And be it further enacted, That nothing in the preceding sections shall be construed to take away or affect the remedy to which any party may be entitled, against the master, officers, or mariners, for or on account of any embezzlement, injury, loss, or destruction of goods, wares, merchandise, or other property, put on board any ship or vessel, or on account of any negligence, fraud, or other malversation of such master, officers, or mariners, respectively, nor shall any thing herein contained lessen or take away any responsibility to which any master or mariner of any ship or vessel may now by law be liable, notwithstanding such master or mariner may be an owner or part owner of the ship or vessel.

[As carried over into the U. S. Code (See, 187 of Title 46), the foregoing section reads as follows:

"See, 187. *Remedies reserved.* Nothing in the five

preceding sections shall be construed to take away or affect the remedy to which any party may be entitled, against the master, officers, or seamen, for or on account of any embezzlement, injury, loss, or destruction of merchandise, or property, put on board any vessel, or on account of any negligence, fraud, or other malversation of such master, officers, or seamen, respectively, nor to lessen or take away any responsibility to which any master or seaman of any vessel may by law be liable, notwithstanding such master or seaman may be an owner or part owner of the vessel."]

Appendix B.

The Harter Act.

Act of Feb. 13, 1893; Chap. 105,

(27 Stat. 445.)

Sec. 1: That it shall not be lawful for the manager, agent, master, or owner of any vessel transporting merchandise or property from or between ports of the United States and foreign ports, to insert in any bill of lading or shipping document any clause, covenant, or agreement whereby it, he, or they shall be relieved from liability for loss or damage arising from negligence, fault, or failure in proper loading, stowage, custody, care, or proper delivery of any and all lawful merchandise or property committed to its or their charge. Any and all words or clauses of such import inserted in bills of lading or shipping receipts shall be null and void and of no effect.

{The foregoing section was carried over verbatim into the U. S. Code [as Sec. 190 of Title 46.]}

Sec. 2. That it shall not be lawful for any vessel transporting merchandise or property from or between ports of the United States of America and foreign ports; her owner, master, agent, or manager, to insert in any bill of lading or shipping document any covenant or agreement whereby the obligations of the owner or owners of said vessel to exercise due diligence to properly equip, man, provision, and outfit said vessel, and to make said vessel seaworthy and capable of performing her intended voyage, or whereby the obligations of the master, officers, agents, or servants to carefully handle and stow her cargo and to care for and properly deliver same, shall in any wise be lessened, weakened, or avoided.

[The foregoing section was carried over verbatim into the U. C. Code as Sec. 191 of Title 46.]

Sec. 3. That if the owner of any vessel transporting merchandise or property to or from any port in the United States of America shall exercise due diligence to make the said vessel in all respects seaworthy and properly manned, equipped, and supplied, neither the vessel, her owner or owners, agent, or charterers, shall become or be held responsible for damage or loss resulting from faults or errors in navigation or in the management of said vessel nor shall the vessel, her owner or owners, charterers, agent, or master be held liable for losses arising from dangers of the sea or other navigable waters, acts of God, or public enemies, or the inherent defect, quality, or vice of the thing carried, or from insufficiency of package, or seizure under legal process, or for loss resulting from any act or omission of the shipper or owner of the goods, his agent or representative, or from saving or attempting to save life or property at sea, or from any deviation in rendering such service.

[The foregoing section was carried over verbatim into the U. S. Code as Sec. 192 of Title 46.]

Sec. 6. That this act shall not be held to modify or repeal sections forty-two hundred and eighty-one, forty-two hundred and eighty-two, and forty-two hundred and eighty-three of the Revised Statutes of the United States, or any other statute defining the liability of vessels, their owners, or representatives.

[The foregoing section, as carried over into the U. S. Code (Sec. 196 of Title 46), reads as follows:

"Sec. 196. *Certain laws unaffected.* Sections 190-195 of this title shall not be held to modify or repeal sections 181, 182, and 183 of this title, or any other statute defining the liability of vessels, their owners, or representatives."

Appendix C.

THE PHEBE.

Fed. Case No. 11,064.

(1 Ware (263) 265.)

District Court, D. Maine. March 13, July 12, 1834.

This was a suit founded on a bill of lading.—The libel alleged that on the 24th of August, 1832, G. W. McLellan, the libellant, shipped on board the Phebe, of which Otis Roberts was master, 136 tons of gypsum, consigned to Jabez Ellis & Son, of Boston, of the value of \$259.78, the master to have for his freight all the net proceeds of the sales over that sum, for which he signed three bills of lading; that the master, instead of carrying the gypsum to Boston, stopped at Castine, transhipped it on board another vessel, and has never delivered it to the consignees. Perkins, the owner, filed a claim and put in an answer to the libel, alleging that on the first day of August, 1832,

he let the vessel to Roberts, to be employed in the coasting trade, on a parol agreement, by which Roberts was to victual and man and have the entire control of the vessel, and that the owner was to have one half of her earnings for the hire of the vessel; that Roberts having taken the vessel on this agreement, to be employed solely by him and on his account, went with her to Eastport, and there purchased on his own account a quantity of gypsum, or plaster-of-paris, for which he paid in part and agreed to pay the balance to Ellis & Son; that after the plaster was laden, McLellan illegally compelled Roberts to give him a bill of lading of the plaster in question, as security for the payment of the balance due; that it was agreed between Roberts and McLellan that Roberts should sell the plaster, and from the proceeds of the sale, pay over the balance due to McLellan to Ellis & Son; that after the brig sailed, she became so leaky, by the dangers of the seas, that the master was obliged to put into Castine and there procure another vessel to carry the plaster to Boston; that Perkins, the owner, had no interest in the contract made by Roberts, and he prays that the vessel may be pronounced free from the lien, and delivered to him. The libellant, to prove his case, offered in evidence the bill of lading signed by Roberts, the master. The claimant, to prove the facts alleged in the answer, offered the depositions of the master and one of the crew. The master's deposition was objected to on the ground that he was interested in the result of the suit, and both were objected to on the ground that parol evidence was inadmissible to control the effect of the bill of lading.

C. S. Davis, for libellant.

Mr. Longfellow, for claimant.

Ware, District Judge. The case has been argued on the allegations in the libel and answer, and on the admissibility of the evidence offered by the respondent. The general principle that the vessel is liable in specie to the

shippers, for the non-exécutiōn of a contract of affreightment by a bill of lading, has not been controverted; but it is contended that the circumstances of this case take it out of the général rule. In the present case, the vessel was not in the employment of the owner. When a vessel is let by charter-party, and the charterer victuals and mains, and has the entire control of the vessel, the general owner is not responsible for the acts of the master. The charterer is substituted in his place, and becomes owner *pro hac vice*. There was, in this case, no charter-party in writing; but the vessel was let by a parol agreement, under which the hirer was to have the entire control of her. The owner had no right to interfere in any way in the employment of the vessel, while the contract remained in force. The master, also, was not appointed by him, and cannot therefore be considered as his agent, nor can he be held directly responsible for his acts.

It has been contended in argument, by the counsel for the libellant, that though the owner has divested himself of all right of control with respect to the employment of the vessel, yet as he receives for the hire of the vessel, not a fixed and stipulated sum, but a certain proportion of the freight and earnings, be they more or less, he is directly interested in the freight, and ought to be held jointly liable with the hirer. The principle on which the owner is bound for the acts of the master is supposed to be borrowed by the maritime law directly from the exercitory action of the civil law. He is not liable in his character of owner or proprietor of the vessel, but as employer, for that is the meaning of the word "exercitor." In that character he is responsible for the acts of the master, first, because he is his agent and is appointed by him, and subject to his orders, and secondly, because he is entitled to the earnings of the vessel. The definition of exercitor is, the person who receives the earnings of the vessel. "Exercitorem autem cum dicimus ad quem obventiones et redditus omnes pervenient." *Dig.* 14, 1, 1, 15. As the profits of the vessel were to be equally divided between the general

owner and the charterer, it is contended that they are liable as joint exercitors; that the form of the contract constituted them, in fact, partners in the business carried on by the vessel. The argument is certainly not without force, and would deserve to be maturely considered if the question could be considered as an open one in this country. But it is too firmly settled by judicial decisions to be now brought into controversy. The cases of *Reynolds v. Toppau*, 15 Mass. 370, *Taggard v. Loring*, 16 Mass. 336, *Thompson v. Snow*, 4 Greenl. 268, and *Emery v. Hershey*, 4 Greenl. 407, have fixed the legal construction of a contract like this. The general principle is that when, by a contract of charter-party, the charterer takes the vessel into his own possession and control, and navigates her by his own master and crew, he alone is responsible for the acts of the master; and these cases decide that it makes no difference, in this respect, although the owner may be so far interested in the voyage that he receives for the hire of his vessel a certain proportion of her earnings, instead of a fixed sum. Although this mode of determining the hire of the vessel gives to the contract the aspect of a partnership transaction, it is not admitted to draw after it the consequences of a partnership, but is considered merely as an equitable mode of ascertaining the charter, or the real value of the use of the vessel. And the rule of construction applied to contracts in this form is analogous to the other decisions of the maritime law, and the law merchant. It was formerly a common practice, and is now perfectly legal for seamen to engage, not for wages, at a fixed and stipulated price, but for a share of the freight and profits of the adventure. It is still customary in some branches of business, as in the fisheries, both in the cod and whale-fisheries, for seamen to engage on shares, by which they become directly interested in the profits of the voyage; but contracts of this kind have never been considered as constituting partnerships, in the proper sense of the word, and the incidents belonging to a contract of partnership have never been considered as

applicable to them. So a clerk may agree with a merchant to receive as a compensation for his services a certain portion of the profits of the business, instead of a fixed salary, without being involved in the liabilities of a partner; that is, he may stipulate for a contingent compensation, to be ascertained by some future event, and that event may be the issue or success of the business in which he is employed. 3rd *Kent.*, Comm. [33]. The distinction is, whether he is interested in the profits, as profits, or whether recourse is to be had to them only to determine the measure of his compensation. The distinction savors, it is true, of refinement and subtlety, and its solidity and justice has been questioned by high authority (*Ex parte Hamper*, 17 Ves. 404), but it is too firmly established to be now brought into doubt. The principle is applied, in the cases cited, to the hire of a vessel upon the terms on which this was hired. If, then, this action had been brought against the owner in personam, it could not have been sustained.

Inasmuch as the owner cannot be held directly and personally responsible in this case, it is contended that he cannot be indirectly held, by subjecting his property to this responsibility. The argument is, that the liability of the vessel is merely collateral or accessory to that of the owner, and stands in the nature of a surety or pledge. This objection admits of two answers. In the first place, conceding it to be correct in principle that the liability of the vessel is only collateral and subsidiary to that of the personal responsibility of the owner, by the owner in this case is meant, not the proprietor but the employer. Roberts, the charterer, is for this purpose the owner; he is the executor, and it is to the quality of executor or employer that the liability is attached. Allowing, then, the liability of the vessel to be not primary but collateral, it is collateral to that of Roberts. But the argument is founded on a misconception of the true principles of the law. This rule, by which the vessel is bound in specie for the acts of the master, is not derived from the civil

law, but has its origin in the maritime usages of the middle ages; and it is to these usages that we must look to ascertain its true character. The civil law considered the master as the simple *praepositus*, or agent of the owner or *exercitor*, and authorized him to bind his principal in all matters relating to the business with which he was intrusted. Dig. 14, 1, 1, 7. The act of the master, while acting within the limits of his authority, bound the principal in the same manner as it would if it had been the act of the principal himself. If there were several *exercitores*, each was bound in *solido*, that is, to the full amount of the obligation contracted by the master, because he was the *praepositus* of each *exercitor*; and also in favor of the creditor, *ne in plures adversarios distingatur qui cum uno contraxerit*. Dig. 14, 1, 1, 25; Id. 14, 1, 2. The *exercitor* was equally bound for the acts of the master, whether the obligation was *ex contractu* or *ex delicto*, and whether resulting from the fraud or negligence of the master; not indeed by the *exercitory action* which relates exclusively to the contracts of the master, but by other appropriate actions of the law. Huber, Praelect, Jur. Civ. Lib. 14, 1, 8; Dig. 4, 9, 3, 1; Id. 4, 9, 4; Id. 44, 7, 5; Id. 47, 5, 1; Voet ad Pand. 14, 1, 7. But for the obligations of the master *ex delicto*, if there were several *exercitores*, each was bound only for his own proportion. Dig. 4, 9, 7, §4 and 5. But by the maritime usages and customs of the middle ages, which, having been generally adopted by merchants, silently acquired the force of a general law, the master, who was ordinarily a part owner (see Consulat de la Mer, *passim*, particularly chapters 46-57, or chapters 1-11 of the edition of Pardessus, Jugemens d'Oléron, art. 1; Droit Maritime de Wisbuy, Pardessus Ed., art. 15; Collection des Lois Maritimes, p. 470, note 7), was not considered as properly the agent or mandatary of the other part owners, but rather as the administrator of the property, that is, of the vessel which was intrusted to his care and management. He was authorized to employ it for the common benefit

of all the owners, more in the character of the acting partner of a *société en commandité*, or limited partnership, than in that of agent for his co-owners. As the *gérant* or active partner, he was authorized to act for the other owners, and bind them in all matters relating to the employment of the vessel, to the extent of their interest in it; or to speak more correctly, to bind the property itself which was confided to his administration; but his authority did not extend to a sale of the ship without the express consent of his co-owners, except in a case of necessity. *Consulat de la Mer*, c. 256. The ship and freight were pledged for the fulfilment of these obligations; and might be seized and sold to satisfy them. This is evident from many chapters of the Consulate of the Sea, the most complete and authentic record of these primitive usages and customs. *Consulat de la Mer*, cc. 58, 63, 72, 138, 186, 193, 227. Thus all the contracts of the master with the mariners for their wages, with material-men, for repairs and supplies of rigging, or for provisions, or other necessaries for the vessel, involved a tacit hypothecation of the ship and freight. But he was not authorized, in his character as master, and as representing his co-owners, to bind them beyond the value of their share in the ship and freight. To do more than this, he must have a special power for that purpose. *Consulat* (Boucher's Trans.) c. 34. He was the agent or representative of the other owners, only so far as they had confided their capital to his administration. If the vessel was lost before the creditors were paid, they had no remedy except against the master. The other part owners, were discharged from all responsibility. Let the lender, then, says the Consulate, take care how he lends, for the owners lose enough when they lose their shares. Chapter 239, or 194 of the edition of Pardessus. The master could not, therefore, in the proper sense of the word, bind the owners, personally, at all because they could always withdraw themselves from their personal responsibility by

abandoning the ship and freight. 2 Pard. Lois Mar. p. 235, note.

If there were some exceptions to the general rule, in cases where the other part owners were present, and unreasonably refused to contribute their proportion towards the necessary repairs and outfit of the ship, as in the case mentioned in the Consulate (chapters 239 and 245; and see note of Pardessus cited above), these are but exceptions standing on their own peculiar reasons, and applied only when the owner was present, and when it might be imputed to them as a fault that they unreasonably refused to contribute to the necessary expenses of the ship. But in a Foreign port, or where the owners were not present, and the master was acting under the general authority which the law or custom gave him as master, he could only bind the ship and freight. It was for this reason that Emerigon, whose mind was deeply imbued with the maritime traditions of the middle ages, says that the liability of the owners to answer for the acts of the master is rather real than personal. The legal power of the captain, says he, does not extend beyond the limits of the vessel of which he is master, that is, administrator. He cannot bind the other property of the owners, unless he have a special power for that purpose. Contrats à la Grosse, c. 4, §11. There was the same limitation of the responsibility of the owners, whether the demand of the creditor was founded on the contract or tort of the master, or whether the damage for which he sought réparation resulted from the fault of the master, or the defects or insufficiency of the vessel, or her tackle or apparel. Consulat de la Mer, c. 227 and 63-72. Whenever a merchant formed any engagement with the master, he could look for his security only to the master himself, and to the capital of the owner, the administration of which was confided to him, that is, the ship and the freight. Thus we find, when the principle is traced back to its source, that it is by no means correct to say that the liability of the vessel is merely collateral or

accessory to that of the owner. On the contrary, in the origin of the custom the primary liability was upon the vessel, and that of the owner was not personal but merely incidental to his ownership, from which he was discharged either by the loss of the vessel or by abandoning it to the creditor. But while the law limited the creditor to this part of the owner's property, it gave him a lien or privilege against it in preference to his other creditors. This limitation of the responsibility of owners, though generally if not universally received by the maritime states of continental Europe, at least so far as relates to obligations arising from the faults of the master, has never been adopted in England or in this country, as a mercantile usage or customary law. Several acts of parliament have limited the responsibility of owners for the tortious acts of the master, to the value of the ship and freight, but the common, like the civil law, holds the owner responsible without limitation. Abb. Shipp. pt. 3, c. 5. And what is alone material in this case, the principle that the ship and freight are bound for the acts of the master, has been incorporated into the maritime jurisprudence of England, though from the limited jurisdiction of the admiralty, the shipper cannot have the full benefit of it. Abb. Shipp. p. 93. In this country the lien is not only acknowledged, but is enforced by our courts of admiralty. And having been borrowed from the general maritime law, or the customs and usages of the sea, we must look to them, rather than to our peculiar maritime jurisprudence, for its true character and the cases to which it applies. By that law, the master's authority to bind the vessel is the same, whether he is appointed by the owners, or the ship is let to him by a charter-party. The Consulate of the Sea (chapter 289) presents a case of the letting of a ship by a contract identical in all its conditions with this, (the contracts of *comienda* or *commande*,) to be employed by the hirer for a share of the profits, and the ship is declared to be liable in the hands of the hirer, and he to be answerable to the owners.

Whoever deals with the master, in all cases where he is acting within the scope of his authority as master, is entitled to look to the ship as his security. There is, therefore, no foundation in law for the distinction insisted upon by the respondent's counsel. Nor has it any more foundation in reason or mercantile policy. If this privilege is given as an additional security to the merchant, the reason for it is quite as strong, to say the least, when the ship is employed under a charter-party, as when it is in the employment of the owner. The owner has his remedy against the charterer.

The other question is, whether the respondent can, in this case, be admitted to contradict, by parol evidence, the bill of lading executed by the master. The question is not whether the master can himself contradict it, or the employers of the vessel by whom he is appointed and whose acts they are responsible. The proprietor in this case intervenes as a third person, who has no interest in the contract between the master and shipper. The rule of law that parol evidence shall not be admitted to control or contradict a contract reduced to writing, applies between those who are parties to it and those who represent them or derive their rights from them. It does not apply against third persons, whose rights may be incidentally affected by the contract. Admitting, then, that the bill of lading is conclusive against the master, which is undoubtedly true as a general rule, it does not follow that it is so against the respondent, who is a stranger to the contract. It would open a wide door for fraud if third persons could in this way be precluded from proving the truth. The bill of lading, says Valin, is conclusive against the assured, and nothing can be admitted against its tenor. 2 Valin, Comm. p. 139. He is a party to it. But it is not conclusive on the insurers. They may disprove it by every species of legal evidence. Emer. Ins. c. 11, §3; 2 Valin, Comm. p. 144. Nor is the bill of lading conclusive against other shippers, in cases of jettison and contribution. Valin, Sur Ordonnance de la

Marine, liv. 2, tit. 3, art. 7; 4d., liv. 3, tit. 8, art. 9. "The nautical laws of all times, have," says Boulay Paty, "given to the bill of lading the character of proof; it is received not only between the master and merchant-shipper, but also against the insurers and all other persons, saving the right to prove fraud or collusion. It is beyond doubt, that third persons, who are not parties to the bill of lading, have a right to contradict and prove its incorrectness by every species of proof." 2 Cours de Droit Mar. p. 306. The proprietor, who in this case is a stranger to the contract, may, on the principles both of the common and maritime law, be admitted to explain and contradict it by every species of legal evidence.

After the foregoing opinion was delivered, the cause was continued on the motion of the libellant, to enable him to introduce further evidence in support of the libel. The principal evidence was the testimony of Mr. Buckman, who at the time of the transaction was a clerk in the store of the libellant. He stated that Roberts, in the first place, purchased 220½ tons of plaster, of McLellan, on account of the owners; that the original intention of Roberts was to carry the plaster to New York, but that after the brig was loaded, it was found that she leaked so badly that it was necessary to take out part of the cargo, namely, about eighty tons; that the sale was then rescinded, and the destination of the vessel changed to Boston; and that it was agreed that the master should carry the plaster which remained on board, on freight, and receive for the freight all the proceeds of the sale over \$259.78, which was the price he had agreed to pay for it.

The respondent offered the depositions of Roberts, the master, and Gray, one of the hands. Gray stated that when Roberts arrived at Eastport he went to McLellan, and asked him to put on board a cargo, on freight; that McLellan declined, on account of the low price of plaster, and that Roberts afterwards purchased of him a cargo of plaster, intending to carry it to New York, but on account

of the leaky state of the vessel part of it was relanded by the order of McLellan. Roberts, in his deposition, says that he purchased the plaster of McLellan, and that, after the vessel was loaded, McLellan required him to sign bills of lading of the plaster as being shipped by him, as security for the sum due for the purchase, and for cash advanced; and that after the bills were signed, McLellan agreed that instead of delivering the plaster to Ellis & Son, he might sell it, and pay over to them the sum due, that is \$259.78, and that he, not being much acquainted with bills of lading, thought that he might properly enough sign the bills, as he was requested.

WARE, District Judge. It has been suggested at the argument that after the Phebe put into Castine, and the cargo was transhipped into another vessel, it was actually carried to the port of destination, although it is not pretended that it was delivered to the consignées, or the proceeds of the sale deposited with them. But it is argued that the Phebe having been disabled by the dangers of the seas from pursuing the voyage, and the goods having been transhipped to be conveyed in another vessel, she is discharged from the lien, and that, if any exists, it attaches to the vessel to which they were transferred. The argument proceeds on the assumption that the Phebe was prevented from performing the voyage and delivering the cargo, according to the terms of the bill of lading, by the dangers of the seas. But the fact, according to the evidence, was otherwise. It appears that she was in a leaky condition when the plaster was taken on board, and without meeting with any bad weather, or any accident, she was obliged to put into port because she was, in fact, unseaworthy and unfit for the voyage. The goods were laden on board the Phebe, and she became bound for the performance of the contract, supposing it to be a contract of affreightment, unless she was prevented by some of the perils excepted in the bill of lading. Whether the other

vessel into which they were transhipped, might not also be liable, is a question which does not arise in this case.

But the principal question which arises on the new evidence is, whether there was in this case a bona fide contract of affreightment, or whether it was a contract for a sale of the goods, disguised under the form of an affreightment. I agree with the respondent's counsel, that if this bill of lading was used merely as a disguise to cover a sale, or if it were an arrangement resorted to as a security for the payment of the purchase-money, it could create no lien on the vessel; and if such were the contract, it is immaterial whether the purchase was made by the master on his own account, or on the account of his owners. In neither case would the vendor be entitled to a lien on the vessel for his security. It is only those contracts which the master makes in his quality as master, that specifically bind the ship, and affect it by way of a lien or privilege in favor of the creditor. But is there any evidence that this was not a bona fide contract of affreightment? It is proved by a bill of lading in the usual form. Though this is not binding and conclusive with respect to third persons, it is, with respect to them, evidence of a high character. It may be impeached; but it is not lightly to be presumed that parties, who put their contracts into writing with all the usual forms and solemnities which belong to it, intend a different contract from that which the written agreement plainly expresses. It belongs to him who impeaches it to show, by satisfactory evidence, that it is a simulated contract.

The first circumstance relied on for this purpose appears on the face of the paper. The master was to receive for his freight, not a fixed and certain sum, but all that the plaster should sell for over a certain sum. This is an unusual mode of settling the amount of freight, but there is nothing illegal in such an agreement. The master could lose nothing but the run of the vessel, for he would be discharged by delivering the cargo to the consignees,

and for his compensation he might be willing to take the risk of the market. Another circumstance relied upon is, that at the time when the bill of lading was executed, a bill of parcels was delivered by McLellan to the master, in which 220 tons of plaster was charged to the brig, with some other small charges, and credit was given for the plaster returned, and the account was balanced, by this sum of \$259.78, to be paid to Ellis & Son, as per bill of lading. It is argued that this paper shows clearly that there was a sale of the plaster, and that the bill of lading was only given as a security for the payment. But this paper is not a contract nor legal evidence *per se* of a contract. It is but a memorandum of one of the parties, and is satisfactorily explained by the parol evidence. It is proved that in the first instance there was a sale of the plaster, and when it was found, from the leaky condition of the vessel, that she was unfit for the intended voyage to New York, eighty tons of the plaster was relanded, and the voyage changed from New York to Boston. Buckman, the clerk of the libellant, says that the contract was rescinded and a new agreement made, by which the master was to take the plaster on freight. Roberts say that although the plaster was consigned to Ellis & Son, he was authorized to sell it and pay over the amount named in the bill of lading, instead of delivering the plaster to Ellis & Son. Now as Roberts was to have for freight all that the plaster should sell for over a certain sum, and that if it sold for no more he would have nothing, it was but reasonable that he should have the power of trying the market, and getting the best price that could be obtained. The memorandum given to Roberts may be considered as giving him an implied authority to sell the plaster and pay over the balance of the amount, instead of delivering it to the consignees. The only evidence opposed to this view of the transaction is that of Roberts himself. He says that the bill of lading was given merely as a security for the payment of the purchase-money. Now, waiving

all objection to the admissibility of his testimony, as a witness to impeach an instrument to which he is a party, his testimony alone and unsupported, for Gray, the other witness, left the vessel before she sailed, is insufficient to overbalance the credit due to the bill of lading, sustained as it is by the direct testimony of Buckman.

[Note. The vessel was sold on the issuing of a venditioni expónas, and the counsel for libellant subsequently moved for a rule on the marshal to pay into court the residue of the money for which the brig was sold. The motion was granted. Case No. 11,065. A motion was thereupon made, by the counsel for the actor, for a monition to Perkins, the purchaser, to show cause why he should not pay to the marshal the balance of the purchase money, which is unpaid. The motion was granted. Id. 11,066.]

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REPLY
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IN THE

Supreme Court of the United States
OCTOBER TERM, 1943.

No. 32.

In the Matter
of the

Petition of KABUSHIKI KAISHA KAWASAKI ZOSENJO, Owner,
and KAWASAKI KISEN KABUSHIKI KAISHA, Barreboat
Charterer of the steamship "VENICE MARU", for Exon-
eration from and Limitation of Liability.

CONSUMERS IMPORT CO., INC., *et al.*,
Cargo Claimants-Petitioners,

vs.

KABUSHIKI KAISHA KAWASAKI ZOSENJO and KAWASAKI
KISEN KABUSHIKI KAISHA,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT
COURT OF APPEALS FOR THE SECOND CIRCUIT.

REPLY BRIEF OF PETITIONERS.

D. ROGER ENGLAR,
T. CATESBY JONES,
EZRA G. BENEDICT FOX,
THOMAS H. MIDDLETON,
Proctors for Petitioners.

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1943.
No. 32.

In the Matter
of the

Petition of KABUSHIKI KAISHA KAWASAKI ZOSENJO, Owner,
and KAWASAKI KISEN KABUSHIKI KAISHA, Bareboat
Charterer of the steamship "VENICE MARU", for Exon-
eration from and Limitation of Liability.

CONSUMERS IMPORT CO., INC., et al.,
Cargo Claimants-Petitioners,

VS.

KABUSHIKI KAISHA KAWASAKI ZOSENJO AND KAWASAKI
KISEN KABUSHIKI KAISHA,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT
COURT OF APPEALS FOR THE SECOND CIRCUIT.

REPLY BRIEF OF PETITIONERS.

Introduction.

Respondents contend, (1) That the intent of Congress was that the Fire Statute should be applicable to suits *in rem* as well as to suits *in personam*; and (2) that the contract involved in this litigation was not in fact a master's contract although it appeared to be so on the face of the bill of lading.

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(1) It is noteworthy that respondents quote from the case of *The Main v. Williams*, 152 U. S. 122, on the question of intent. It is equally noteworthy that they omit from their quotation the extended discussion which appears at pages 132-133 of 152 U. S. in the opinion in that case. There this Court took occasion to say, regarding the proper construction of this very statute, that it should be construed strictly in so far as it derogated from the legal rights of individual parties, and that there was nothing in the statute to require a construction more favorable to the shipowner than the plain meaning the words import. We discuss this case in greater detail *infra*, at page 11. We submit that, as we argue in our main brief, the intent of Congress as to the meaning of the statute is clear from the words of the statute itself and from a reading of Section 1 along with other sections of the statute. In these other sections Congress made it entirely plain that it did not intend by the Act in any way to exempt a master from liability for his contracts, or for his negligence or for failure to perform his contracts.

(2) The circumstance that the statute specifically provides, in Section 6, that the master shall not be excused for his failures or derelictions, so disturbs the respondents that they devote their second point to a futile attempt to show that the bills of lading involved in this case, in so far as they were signed "for master", should be disregarded. They make this argument notwithstanding the fact that, as found by the Court below, "all the cargo involved had been shipped on board the S. S. 'Venice Maru' in apparent good order and condition, for carriage pursuant to the terms and conditions of certain negotiable bills of lading, duly issued either by the head office of the petitioner, Kawasaki Kisen Kabushiki Kaisha, or by one of its sub-offices, or by its duly authorized agents" (Finding 3, R. 40-41), and in spite of the fact that the bills of lading (Exhibit 9, R. 30) were

signed "for master". Respondents seek to avoid the effect of this contract by arguing that if the Court gives the bills of lading the meaning for which we contend, the Court is presented with an unreal situation.

If by unreality respondents mean that the "K" Line was the real party in interest, because it stood to gain any profit to be made by the transaction, and that the master as a party to the contract should be ignored, we submit that such argument is opposed to the well-settled authority on the subject. Respondents ask this Court to ignore the words "for master" which appear plainly on all these negotiable bills of lading, and deal with the case as if those words did not exist.

In fact, respondents are driven to take the extreme position (p. 27) that "there is no such thing as a master's contract of affreightment; he is always acting as an agent, either for the owner or the charterer and the contract is that of his principal" (p. 27 of respondents' brief). This statement is squarely contrary to the settled law on the subject. See *The Phœbe*, 1 Ware 263, Fed. Cas. No. 11,064, discussed both in our main brief and hereafter at pages 223, and the approval specifically given the holding in that case by this Court in *Schooner Freeman v. Buckingham*, 18 How. 182, at page 189, where this Court said:

"We are of opinion that, under our admiralty law, contracts of affreightment, entered into with the master, in good faith, and within the scope of his apparent authority as master, bind the vessel to the merchandise for the performance of such contracts, wholly irrespective of the ownership of the vessel, and whether the master be the agent of the general or the special owner" (p. 189 of 18 How.).

See also *Gaus S. S. Line v. Wilhelmsen (The Themis)*, 275 F. 254, where it appears (p. 258) that Barber & Co.,

who were charterers, had issued to shippers bills of lading signed by them "For the Master". In discussing the effect of these bills of lading, Judge Hough, speaking for the Circuit Court of Appeals for the Second Circuit, said (p. 262):

"But when (Barber & Co.'s authority to sign for the master being undisputed) the master of a ship chartered but not demised, which was the condition of *Themis*, issues bills of lading, we hold that *the contract evidenced thereby is not only the ship's contract*, and that of the time or other charterer who caused their issue, but that of the owner, whose master (i. e., authorized agent) issued the same. Therefore in this instance the shippers had, *beyond the obligation of the ship*, the right to look to all three respondents and hold any or all of them personally liable for right fulfillment of the bills" (p. 262 of 275 F.). (Italics ours.)

In the *Gans Line* case, *supra*, Judge Hough cited *Tillmans v. Knutsford*, 13 Com. Cas. 244, 334, and *Manchester Trust v. Furness*, 8 Asp. M. C. 57. In the *Tillmans* case, *supra* (also reported in (1908) 1 K. B. 185, aff'd (1908) 2 K. B. 385 (C. A.), aff'd (1908) A. C. 406—H. L.), one of the bills of lading (the fourth) was physically signed by the time-charterer, but following the signature appeared the words: "For Captain and Owners". With regard to the effect of such signature, Channell, J., said (p. 191):

"I am of opinion that the effect of their so signing is exactly the same as if they had directed the captain to put his name to the bill of lading and he had accordingly signed it. If they had struck out the words 'for the captain and owners,' and then signed it, I think they would, on the face of it, have been purporting to make it their own contract; but they did not purport to make it their own contract. They

purported to sign it for the captain and owners; and, therefore, to make it the contract of the captain and owners, and they had absolute power to do that by the terms of the charterparty. Consequently the objection taken on behalf of the defendants to their signature fails. The objection would have been good if the captain's hand did not bind the owners, but "for the reasons I have given I am of opinion that the fourth bill of lading is exactly on the same footing as the other three" (p. 191 of (1908) 1 K. B.).

The other three had been signed by the master in person. All three Judges in the Court of Appeal agreed with the foregoing. (See pp. 393-4, 406, and 406-7 of (1908) 2 K. B.) The judgment was unanimously affirmed by the House of Lords (1908 A. C. 406). Lord Loreburn, *L. C.*, thought the owner's defense on this point "destitute of merits" (p. 408); Lord Macnaghten thought it "ought not to have been raised" (p. 408); and Lord Dunedin was "content with the judgment of Channell, *J.*" (p. 410) on this point.

In *Manchester Trust Limited v. Furness Withy & Co.*, 8 Asp. M. Cases 57, at p. 69, the Court of Appeal pointed out that the usual time charter (and that was the case in the case under decision) contains a provision that, "In signing bills of lading it is expressly agreed that the captain shall only do so as agents for the charterers, etc.". There is no such provision in the charter in this case (Ex. 17, R. 31-33). The situation here is precisely the same as it was in the *Schooner Freeman v. Buckingham*, 18 How. 182, and in *The Phebe*, 1 Ware 263, Fed. Cases No. 11,064, where the master derives his authority not from the common or civil law of agency, but from the Maritime Law which vests the master with authority in his quality as master. When the master permits the charterer to sign for him, the bills of lading, as was held in *Gaus S. S. Line v. Wilhelmsen*, 275 Fed. 254, 262,

are still the ship's contracts. Whether he is still the agent of the owner or charterer is for our purposes of no consequence, because no right asserted under the common or civil law is now before the Court. The *in rem* liability of the "Venice Maru" arises from the maritime law.

See also *Wilston S. S. Co., Ltd. v. Andrew Weir & Co.*, 31 Com. Cases 111, at pp. 116-7.

In short, the law is well settled that a bill of lading with the clause "For Master" below the signature binds the master and the ship itself irrespective of whether it is physically signed by him in person or by a charterer or other person acting on his behalf.

The Court below found that the bills of lading in the case at bar are negotiable documents (Finding 3, R. 40-41). There is not a line of evidence anywhere in the case to show that any of the petitioners had any reason to believe that the bills of lading were in any way simulated contracts; on the contrary, it has been stipulated that some of the petitioners were "the owners and holders for value of the bills of lading" (R. 23). Negotiable documents in the hands of innocent holders should not be lightly repudiated; and, as here, when there is not the slightest ground for repudiation, fair dealing requires that the contract should be enforced as written. We shall deal with respondents' argument under this heading in greater detail below at pages 22-3 *infra*.

Reply to Respondents' Point I.

Point 1 of respondents' brief is the only one in which they actually discuss the terms and meaning of the Fire Statute. It consists of four subdivisions; we shall discuss them seriatim:

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Subdivision A (page 5) reads: "The language is plain and should be construed liberally." We agree with the first part of this statement. The language is indeed plain. It refers only to the liability of the owner. Respondents' contention is that the word "owner" by some philological legerdemain means "owner and vessel". In support of such construction, they rely upon a quotation (p. 6) from the majority opinion* written by Mr. Justice Bradley in *The City of Norwich*, 118 U. S. 468, 503. The reasoning of the lower Court in the instant case (R. 63) is essentially but a paraphrase of that quotation. We have, therefore, made a careful analysis of the decision in *The City of Norwich* case and of the language in question and print the same as an Appendix to this brief. We therein show that the actual decision of this Court in that case does not support the contentions made by respondents in the case at bar and that their interpretation of the language used by Mr. Justice Bradley at page 503 of the majority opinion in that case is squarely contrary to the well-settled principles of admiralty law as laid down in both prior and subsequent authorities which fully support your petitioners' position herein.

We also believe that the opinion of this Court in the "*City of Norwich*" case, *supra*, should be read and interpreted in the light of the opinion in the companion case of *Norwich Co. v. Wright*, 13 Wall. 104. Mr. Justice Bradley, writing for this Court, there pointed out (p. 116) that to reach a true construction of the Act of March 3, 1851, a review of the laws of other countries would be helpful and he then said (p. 116):

"The history of the limitation of liability of ship-owners is matter of common knowledge. The learned opinion of Judge Ware in the case of *The Rebecca*, leaves little to be desired on the subject.

* Justices Matthews, Miller, Harlan and Gray dissented. The dissenting opinion starts at page 528 of 118 U. S.

He shows that it originated in the maritime law of modern Europe; that whilst the civil, as well as the common, law made the owner responsible to the whole extent of damage caused by the wrongful act or negligence of the master or crew, the maritime law only made them liable (if personally free from blame) to the amount of their interest in the ship. So that, if they surrendered the ship, they were discharged" (p. 116 of 13 Wall.).

And he later said (p. 126):

"But it will be observed that the act of Congress contains a provision (Sec. 4) for the shipowner to discharge himself, as in the maritime law, by giving up the vessel and her freight" (p. 126 of 13 Wall.).

In *The Rebecca*, 1 Ware 188, Fed. Cases No. 11,619, a libel *in rem* for the loss of cargo covered by a master's bill of lading, Judge Ware traced the history and origin of the maritime lien and showed that the general maritime law made the owners "severally bound in solido for the acts of the master, whether of tort or contract, but limited the extent of their liability to the value of the ship" (p. 376 of 20 Fed. Cases). He then went on to point out that "the natural consequence of the principle" was "to render the ship herself liable to the creditor *in specie*" (p. 377); and that the "rule, by which the ship is tacitly hypothecated for the obligations contracted by him (the master), when acting in the quality of master, and within the scope of his authority as such" is a cognate of "the principle of the limitation of the responsibility of the owners for the acts of the master" (p. 378 of 20 Fed. Cases).

Our analysis of the "*City of Norwich*" (Appendix, p. 30) has been based on broad principles applicable to the general question certified. The specific facts of the case at bar afford a still further answer to respondents'

contentions as based on Mr. Justice Bradley's observations in *The City of Norwich, supra*. Their contentions are built on the following quoted language from his opinion and amount to this: That "in the matter of liability, a man and his property cannot be separated" (p. 503 of 118 U. S.); that "his property is what those who deal with him rely on for the fulfillment of his obligations" (p. 503—italics ours); that the Fire Statute releases the owner from liability on his obligation; therefore, that his vessel is likewise released from liability although not named in the statutory release from liability. But this argument ignores the admitted facts of the case bar. Concededly, the contracts of carriage covering the cargo which was damaged after loading on board the "Venice Maru", were executed "For Master" (Exhibit R. 30 A). These contracts created an obligation under the maritime law on the part of the master, not on the part of the owner. Under the maritime law, the ship and freight became hypothecated "for the fulfillment of his obligation".* The Fire Statute (Sec. 1 of the Act of March 1851) mentions only the owner and not the master; instead, Section 6 of that act (now 46 U. S. Code, Sec. 7; see Appendix A, page 45 of our main brief)

* *The Phebe*, Fed. Cases No. 11,604; *The Rebecca*, Fed. Cases No. 11,619; *The Creole*, Fed. Cases No. 13,033; and *Vandewater Mills* (*The Yankee Blade*), 19 How. 82, 90, as quoted with approval by this Court in *Osaka Shosen Kaisha v. Lumber Co.*, 10 U. S. 490, at page 497. See also *Krauss Bros. Lumber Co. v. Simon & S. Corp.*, 290 U. S. 117, at page 121, where the present Chief Justice said that "• • • the cases are agreed that the right of the lien has its source in the contract of affreightment and that the lien itself is justified as a means by which the vessel, treated as a personality or as impliedly hypothecated to secure the performance of the contract, is made answerable for non-performance. See *The Freeman*, 18 How. 182, 188; *Vandewater Mills*, 19 How. 82, 90; *Osaka Shosen Kaisha v. Pacific Export Lumber Co., supra*; *The Flash*, 1 Abb. Adm. 67; *The Rebecca*, Ware, 187; *Scott v. The Ira Chaffee*, 2 Fed. 401" (p. 121 of 10 U. S.), and also that "this engagement of the vessel, or its hypothecation", is to be "distinguished from the personal obligation of the owner" (p. 121 of 290 U. S.).

specifically provides "That nothing in the preceding sections shall be construed to take away or affect the remedy to which any party may be entitled against the master *** for or on account of *** loss or destruction of goods *** put on board any ship or vessel ***". Since the remedy against the master for the breach of his obligations is specifically not affected by the Fire Statute, how can that Statute be construed to exempt the vessel which is tacitly hypothesized "for the fulfillment of his obligation"? It is submitted that under the very reasoning followed by the respondents, the conceded facts of the instant case require a decision in favor of petitioners.

In further support of their contention that the simple words of the statute, "no owner of any vessel shall be liable," should be construed as if they read "neither the owner nor the vessel shall be liable," respondents rely upon extracts (pp. 6-7) from this Court's opinion in *The Queen of the Pacific*, 180 U. S. 49, and from the Circuit Court of Appeals' opinion in *The Kensington*, 94 F. 885, 888. Both those cases involved the proper interpretation to be given clauses in a bill of lading. In both cases the Court was seeking the intent of a contract. The determination of the scope and meaning of a contract provision employed by a vessel owner is manifestly different from the determination of the meaning of an exemption granted by statute. In the former instance, the presumption is strong that the beneficiary of the provision intended to obtain thereby the broadest possible benefits. This was made clear by Mr. Justice Brown in *The Queen of the Pacific*, *supra*, in the sentences immediately preceding the one quoted by the respondents at

* Compare Section 4., subdivision 2 (b) of the Carriage of Goods by Sea Act (46 U. S. Code, Section 1304), where Congress did extend exemption to both the ship and the carrier. This is discussed at pages 9 and 12 of our main brief. See also the provisions of the Harter Act discussed at pages 30 and 31 of our main brief.

pages 6 and 7 of their brief. No such presumption exists in respect of the intent behind a statutory exemption in derogation of well-settled liabilities imposed by law. *The Main v. Williams*, 152 U. S. 122, at p. 132.

Respondents urge that the statute in question was remedial, and that it therefore should be construed liberally. Their argument is that this liberality should even go to the extent of interpolating the words "and vessel" after the word "owner". In *The Main v. Williams*, 152 U. S. 122, at page 132, Mr. Justice Brown, speaking for this Court, took occasion to say that our Act was modeled on the similar English statutes and pointed out that (p. 132):

"The English courts have held, very properly we think, that these statutes should be strictly construed. As observed by Abbott, *C. J.*, in *Gale v. Laurie*, 5 B. & C. 156, 164: 'Their effect, however, is to take away or abridge the right of recovering damages, enjoyed by the subject of this country at the common law, and *there is nothing to require a construction more favorable to the ship owner than the plain meaning of the word imports*'. To the same effect are the remarks of Sir Robert Phillimore in *The Andalusian*, 3 P. D. 182, 190, and in *The Northumbria*, L. R. 3 Ad. & Ec. 6, 13. Speaking of this statute, Lord Justice Brett, in *Chapman v. Royal Netherlands Nav. Co.*, 4 P. D. 157, 184, remarked: 'A statute for the purposes of public policy, derogating to the extent of injustice, from the legal rights of individual parties, should be so construed as to do the least possible injustice. This statute, whenever applied, must derogate from the direct right of the ship owner against the other ship owner. * * * It should be so construed as to derogate as little as is possible consistently with its phraseology, from the otherwise legal rights of the parties' " (p. 132 of 152 U. S.). (Italics ours.)

Moreover, such of the cases as to statutory construction cited by respondents which deal with the Act of March 3, 1851, all concern those sections of the Act dealing with limitation of liability to the value of the vessel and her pending freight, i. e., those sections which incorporated into our law the principles of the general maritime law. We submit that the rule of construction referred to by Mr. Justice Brown in *The Main v. Williams, supra*, should be applied to Section 1 of the Act. That section, in contrast with Section 2, does not abridge the right of recovery against the master, nor against the ship hypothesized to secure the performance of the master's contract. Thus the clear statement in Section 6 is that Congress did not intend by Section 1 to relieve the master of his liability for the breach of his contract. Section 6 was applied in *The City of New York*, 25 F. 149, at page 152 (reversed by this Court on other grounds in 147 U. S. 72). The Court there said (p. 152):

"By the English and American maritime law the master is responsible for the loss of cargo equally with the owners, without reference to any personal fault of his own, but by reason of his accountability for the acts or omissions of his subordinates, as a kind of subrogated principle, says Story, and qualified owner; although his liability is more restricted on public vessels, where he does not appoint his subordinates, and is therefore not responsible for their defaults. *Nicholson v. Mounsey*, 15 East, 384; Story, Ag. § 314; *The Limerick*, 1 Prob. Div. 411. It follows that in this case his personal effects must abide the fate of the ship herself, and, like the ship and owners, be held to make up the ship's share of the loss of cargo. The statute of 1851, limiting the liability of owners, excepted all existing remedies against the master, officers, or mariners for loss or injury of cargo. Rev. St. § 4287" (p. 152 of 25 F.)

Thus where cargo has been shipped under a master's bill of lading, the latter's liability for loss or damage thereto, even when caused by fire, remains unaffected by the Act of March 3, 1851. How then can it be said that the vessel of which he is master and which by the settled maritime law is hypothecated for the performance of his contract, is exonerated from liability *in rem* by Section 1 of the Act which in specific terms provides only that the owner shall not be liable? If the Fire Statute does not under such circumstances divest such a maritime lien, why should it be construed impliedly to include the vessel in its terms and thus to divest any other valid maritime lien for cargo damage? As we shall point out below, respondents admit at page 24 of their brief that "there was a maritime lien upon the 'Venice Maru' for damage by fire to her cargo," even under their interpretation of the bills of lading in this case.

Subdivision B of respondents' Point I (p. 8) asserts that "the legislative history of the statute shows that the intention was to completely exonerate shipowners from liability for loss or damage to cargo by fire unless caused by their personal design or neglect." In this connection they point out that the Act of March 3, 1851, was modeled on the English statutes limiting the liability of vessel owners. They later assert that in view of this fact, the same construction should be given the American statute as that given the English statute. We concede that, as in England, so in this country, complete exoneration has been given the vessel owner *in personam* when the fire is not due to his design or neglect. The latest ruling of this Court on this point is *Earle & Stoddart v. Wilson Line*, 287 U. S. 420. But it is to be noted that respondents fail to cite any English case holding that the English Fire Statute divests maritime liens. We also agree (see p. 8 of our main brief) that the litigation arising from the loss of the Steamboat "Lexington" brought the sub-

ject of limitation of liability forcibly to the attention of Congress. The abbreviated quotation at page 9 of respondents' brief from *The Main v. Williams*, 152 U. S. 122, at page 127, fails, however, to make it clear that that litigation (*New Jersey Steam Navigation Co. v. Merchants Bank*, 6 How. 344) was an action *in personam* and did not in any way deal with the vessel's *in rem* liability, but merely held that the owner was personally liable without limitation for losses by fire due to the negligence of his servants.

Respondents also refer to the Senate Proceedings which are to be found in *23 Congressional Globe*, pages 317, 331, 479, 713, 738 and 816. It is to be noted that the references during the debate, and also in the later discussions of the Act in this Court,* all refer to *common law liability*. No mention was made in the Senate of any change in the maritime law to be made by the Act. That law had from the earliest times given a right *in rem* against the ship for cargo damage. On the contrary, Senator Hamlin, the main proponent of the Bill, in explaining the provisions of the Act and particularly those of Section 5 as originally drafted, significantly said that "His vessel is in hazard in any event" (23 Congressional Globe, p. 715, column 2). Any ambiguity on this point was later clarified by amending Section 5 before passage, by adding thereto the provision that "and such ship or vessel, when so chartered, shall be liable in the same manner as if navigated by the owner or owners thereof" (23 Congressional Globe, p. 777, column 3).

Thus, we submit that the legislative intent is made clear by the other sections, viz., by Section 5, where, as we have

* For example, see *Walker v. Transp. Co.*, 3 Wall. 150, 153; *Prov. & N. Y. S. S. Cos. v. Hill Mfg. Co.*, 109 U. S. 578, 603-4; *Craig v. Continental Ins. Co.*, 141 U. S. 638, 646-7; *The Main v. Williams*, 152 U. S. 122, 134. As Mr. Justice Grier pointed out in *The Yankee Blade*, 19 How. 82, at p. 89, an action *in rem* to enforce a maritime lien "is unknown to the common law, and is peculiar to the process of courts of admiralty".

just pointed out, Congress was careful to provide that the "vessel, when so chartered, shall be liable in the same manner as if navigated by the owner thereof" (now 46 U. S. Code, Section 186) and also by Section 6, discussed at pp. 12-13, *supra*.

Subdivision C of respondents' Point I (p. 12) deals with various cases in this Court where reference has been made to the Fire Statute. The first such case is *Moore v. American Transportation Co.*, 24 How. 1. That was an appeal from the Supreme Court of Michigan and merely held that the Fire Statute applied to an owner of a vessel used in interstate commerce on the Great Lakes. Being an action *in personam* in the state court, no question of *in rem* liability was involved.

The next case is that of *Walker v. Transportation Co.*, 3 Wall. 150. That was a libel *in personam* for loss of cargo by fire, and involved only two questions, viz.: "1. Whether the owner of a vessel used in the trade on the lakes is liable, independently of contract, for a loss by fire, which occurs without any design or neglect of the owner; although it may be traced to negligence of some of the officers or agents having charge of the vessel? 2. Whether the special contract set up by the respondent, although admitted by the libellants, was founded on a custom which the law would support, and whether or not, therefore, the case was to be governed by the Act of 1851?" (p. 152 of 3 Wall.). The special contract relied upon there by the cargo owners to take the case out of the Fire Statute* was that the bill of lading exception of

* At that time the Fire Statute contained a proviso to the effect "that nothing in this act contained shall prevent the parties from making such contract as they please, extending or limiting the liability of such owner" (pp. 153-154 of 3 Wall.).

"perils of navigation and perils of the sea" was interpreted by the usage in that trade to mean that the owners were "responsible for the negligence of their officers in case of fire" (p. 154 of 3 Wall.). This Court said (p. 155):

"We do not believe, then, that the special contract set up by respondent, founded on usage, although admitted by the libellants, is founded on a custom which the law will support, and therefore the case must be governed by the act of 1851" (p. 155 of 3 Wall.).

Thus here again only *in personam* liability of the owner was involved; and the Court itself refers to the "ship-owner's *common law* liability". No question of maritime liens was in any way presented, and the case is entirely different from the instant case. This Court in *Schooner Freeman v. Buckingham*, 18 How. 182, at pp. 189-190, held that the customs and usages of the maritime law which create a maritime lien growing out of a master's contract of carriage are supported by our law.

Following their reference to the *Walker* case, *supra*, respondents at page 13 of their brief state that *Craig v. Continental Insurance Co.*, 141 U. S. 638, is "to same effect". The *Craig* case in no way involved the Fire Statute, but merely concerned Section 3 of the Act of 1851.

At page 13 respondents also quote from *Norwich Co. v. Wright*, 80 U. S. 104, which we have already discussed at pages 7-8, *supra*; and it is sufficient to point out at this place that it involved only the question of the personal liability of the owner and the effect of Section 3 of the Act thereon. The reference to the Fire Statute quoted by respondents at page 13 of their brief was pure dictum.

Respondents next cite (p. 13) *Providence & N. Y. S. S. Co. v. Hill Mfg. Co.*, 109 U. S. 578, and quote from Mr. Justice Bradley's opinion therein. This case was an

appeal from the Supreme Judicial Court of Massachusetts. The question actually presented for decision concerned the common law liability of the vessel owner *in personam*, not any *in rem* liability of the vessel under the maritime law,* and was whether a common law action to enforce such personal liability was superseded and stayed by a limitation proceeding in admiralty wherein a stipulation for the value of the vessel had been filed. Under these circumstances the language in question should be construed to apply only to the *in personam* liability of the vessel owner; in fact, this is all that Mr. Justice Bradley actually said. If his dictum is deemed to include the ship's *in rem* liability also, such extension can be made only on the basis of treating an admiralty action *in rem* to enforce a maritime lien as merely another means of enforcing the vessel owner's personal liability. Such a

* This is made abundantly clear in the dissenting opinion of Mr. Justice Field with whom Mr. Justice Gray concurred. He said (pp. 603-4): "The object of the act was to change the rule of the common law as to the liability of the owners of vessels for losses and injury, to which they did not contribute, either designedly or by their neglect, but which were attributable entirely to the acts or omissions of their officers or employees. The common law placed a burdensome responsibility upon the owners for the acts or omissions of their agents or servants without their knowledge or assent; and to lighten this responsibility the statute in question was passed" (pp. 603-4 of 109 U. S.). (Italics ours.) The foregoing is not an isolated expression of the purpose of the Act. For example, Mr. Justice Miller in *Walker v. Transportation Co.*, 3 Wall. 150, at p. 153 (a fire case), pointed out that the Act was "intended to modify the shipowner's common law liability for everything but the act of God and the King's enemies". See also *Craig v. Continental Ins. Co.*, 141 U. S. 638 at pp. 646-7 and *The Main v. Williams*, 152 U. S. 122, at p. 134. We know of no case where this Court has specifically stated that the Act affected liabilities created by the maritime law. On the contrary, this Court has frequently stated that the Act merely brought our law into harmony with the general maritime law. For example in *Norwich Co. v. Wright*, 13 Wall. 104, Mr. Justice Bradley said at p. 127: "We do not hesitate to express our decided conviction, that the rule of the maritime law on this subject, so far as relates to 'torts' was intended to be adopted by the Act of 1851" (p. 127 of 13 Wall.). See also *The Scotland*, 105 U. S. 24, at p. 29.

concept can only rest upon common law doctrines which, as we have shown in our analysis (Appendix, at pp. 36-9) of Mr. Justice Bradley's other remarks in *The City of Norwich*, are different from, and to be distinguished from, the well-settled principles of maritime law.

Subdivision D of respondents' Point I (p. 16) deals with the interpretation given by certain lower courts to the Fire Statute in conflict with the ruling of the Circuit Court of Appeals for the Fifth Circuit in *The Etna Maru*, 33 F. (2d) 232; certiorari denied, 280 U. S. 603. The following analysis of the opinions of those cases demonstrates that such decisions were ill-considered.

Dill v. The Bertram, Fed. Cases No. 3910 (S. D. N. Y.—1857). The quotation used (p. 17) by respondents is mere dictum; the dismissal of the libel *in rem* was apparently based on the fact that no maritime lien existed since the goods damaged by fire had not yet been loaded on board the vessel. This is in accord with this Court's ruling in *Osaka Shosen Kaisha v. Lumber Co.*, 260 U. S. 490.

Keene v. The Whistler, Fed. Cases No. 7645 (D. C. Cal.—1873). This was a libel *in rem* for a loss by fire alleged to have been caused by the negligence of a master who was also part owner. Judge Hoffman there said:

"The circumstance that the master owned an eighth interest in the vessel can have no effect to enlarge the liability of his co-owners. This point was expressly adjudged by the King's bench under the English statute. *Wilson v. Dickson*, 2 Barn & Ald. p. 13" (p. 209 of 14 Fed. Cas.).

The *Wilson* case (106 Eng. Reprints 268) was a common law action against several co-owners of a ship for loss caused by an alleged improper sale of cargo by the

master who was also a part owner. The Court merely held that "the circumstance of the loss being occasioned by his (the master's) fault, and with his privity, will not take away from the other part owners the protection" of the English statute limiting liability to the fixed value of the ship. After pointing out that the principle was approved in *The Volant*, 1 W. Rob. 383,* Judge Hoffman continued:

"From these authorities it results that, though the negligent master, who is a part owner, is liable personally in either capacity for the loss caused by his negligence, the other innocent part owners are protected by the statute, in a suit brought against all the part owners jointly or *in rem* against the vessel, where the property must necessarily be taken to satisfy the decree; or, if she has been bonded, the owners must satisfy the decree out of their own funds" (p. 209 of 14 Fed. Cas.).

It is thus clear that Judge Hoffman adopted the English concept as to the nature of a maritime lien which radically differs from that laid down by this Court (see pp. 26 and 33 of our main brief) and treated it as a mere *jus ad rem* valid only to enforce a personal liability on the part of the owner.

The Rapid Transit, 52 Fed. 320 (N. D. Wash.—1892), a District Court decision, gives no reasons for its conclusion and cites no supporting authority.**

* *The Volant, supra* (166 Eng. Réprints 616) was an action for collision damages where the ship was held liable, but no decree was allowed against "the part owner personally for the excess of damage beyond the proceeds of the ship".

** Incidentally Judge Hanford went on to allow recovery in général average although the facts of the case (*i. e.*, that the damage by water which extinguished the fire arose from the scuttling of the vessel by the Seattle Fire Department), gave no right to recover in general average under the rule laid down in *Ralli v. Troop*, 157 U. S. 386.

In *The President Wilson*, 5 F. Supp. 684 (N. D. Cal.—1933), another District Court decision, Judge St. Sure wrote no opinion in confirming the Commissioner's report. The Commissioner deemed the Circuit Court of Appeals ruling in *The Etna Maru*, 33 F. (2d) 232, to have been disapproved by this Court in *Earle & Stoddart v. Wilson Line*, 287 U. S. 420 (see note on p. 7 of our main brief) and preferred to follow *The Rapid Transit, Keene v. Whistler*, and *Dill v. The Bertram*, discussed *supra*.

In *The Munaires*, 12 F. Supp. 913 (E. D. La.—1935), still another District Court decision, Judge Borah relied on the language in the *Hill* case, discussed *supra* at pages 16-8, and refused to follow *The Etna Maru, supra*, for two reasons; namely (1) that it had been overruled by this Court in the *Earle & Stoddart* case, *supra*, and (2) that the "bills of lading contained an express contract making the Fire Statute a defense". As to the latter, it is submitted that the mere incorporation of a provision that the bill of lading shall be subject to a statute does not operate to enlarge the scope of the statute itself.

In *The Buckeye State*, 39 F. Supp. 344 (W. D. N. Y., 1941), likewise a District Court decision, Judge Knight felt that *The Etna Maru, supra*, had been "disapproved" in *Earle & Stoddart, supra*, and so followed *The Rapid Transit, supra*. Incidentally, his remarks constitute dicta since he went on to find (p. 349) that "the damage was caused by 'heat' and without 'fire'."

Furthermore, none of the foregoing cases in any way discusses the legal proposition that when a master makes a lawful contract for the carriage of goods, such a contract creates an *in rem* liability on the part of the ship separate and distinct from any *in personam* liability on the part of her owner. *The Phebe* and other cases discussed at pages 23-25 of our main brief. The foregoing

District Court cases relied on by respondents all treat the ship's *in rem* liability as being only co-extensive with, and to be measured by, the owner's liability *in personam*.*

Under this subdivision respondents also refer to two cases decided by the Circuit Court of Appeals for the Second Circuit to which this writ of certiorari is directed, viz., *The Salvore*, 60 F. (2d) 683, and *The Older*, 65 F. (2d) 359. As opposing counsel admits (p. 20), the point here involved does not appear to have been specifically brought to the Court's attention in either of those cases.

In summary of this Point, we submit that the express exclusion of the master's liability from the operation of the statute clearly shows a legislative intent to exclude from the operation of the Act the accompanying hypothecation of the ship to secure the proper performance of that contract.

Reply to Respondents' Point II.

Point II of respondents' brief (p. 24) is devoted to an attempt to explain away and render nugatory the

* Contrast the cases where the Court has recognized the maritime lien as being a *jus in re*. Thus, in *The Young Mechanic*, 2 Curt. 404, Fed. Cases No. 18,180, from which we quoted at pp. 20-21 of our main brief, Mr. Justice Curtis ruled that "The inability to maintain a suit against the administrator, and the incapacity to make any attachment of the property of the deceased in such a suit, though they may amount to infirmities in the remedy when pursued in the state courts, do not affect the right of the creditor, nor his remedy in the admiralty" (p. 876 of '30 Fed. Cases). And in *The Home*, 18 N. B. R. 557, Fed. Cases No. 6657, discussed in more detail at p. 40, note, *infra*, Judge (later Mr. Justice) Brown, in enforcing the maritime lien, said: "... there are in fact three independent though not joint debtors in this case, viz.: the charterer, the vessel, and the master, and the release of one does not impair the remedy against the others" (p. 447 of 12 Fed. Cases). See also *The Spartan*, 1 Ware 130, Fed. Cases No. 11,246, and *The Chester*, 25 F. (2d) 908, 910.

specific provisions of the bills of lading issued to cover the cargo loaded on the "Venice Maru". The bill of lading form is printed in the record as Exhibit 9 (R. 20). Even aside from the rule that the terms of a contract are to be most rigidly construed against the party drawing it up, this attempt wholly fails.

Respondents first stress the fact that "the bills of lading were *signed* by the head office or the sub-offices or duly authorized agents of said respondent bareboat charterer" (p. 25), and in support refer to their own answers to interrogatories. We do not deny this fact that the physical execution was made by the "K" Line or its authorized agents.* But neither are the respondents able to deny—and in fact at pages 25 and 26 they specifically admit—that the executory clause in the bill of lading reads: "In witness whereof the owners or *Agents of the said vessel* have signed * * *" (italics ours). (Exhibit 9, R. 30 A.) They further concede, as indeed they must, that underneath the signature appear the words: "for master". As we have pointed out in our main brief (p. 17), the very purpose of execution of this form is to bind the vessel *in rem* as security for the performance of the contract of carriage. Faced with this binding effect upon the vessel of a bill of lading executed in this form, respondents now seek in effect to expunge from these negotiable bills of lading (Finding 3, R. 40, 41) the phrase "for master" and render it wholly nugatory. A similar attempt was made by the vessel owner in *The Phebe*, 1 Ware 263, Fed. Cas. No. 11,064, after Judge Ware had there ruled that a master's contract bound the vessel *in rem*, irrespective of any lack of personal liability of her owner. Judge Ware filed a supplemental opinion dealing with the owner's

* This was also the case in *Gans Line S. S. Co. v. Wilhelmsen* and other cases discussed at pp. 3-6, *supra*. See also page 17 of our main brief.

efforts there to explain away the form of the bill of lading, and he said:

"But is there any evidence that this was not a bona fide contract of affreightment? It is proved by a bill of lading in the usual form. Though this is not binding and conclusive with respect to third persons, it is, with respect to them, evidence of a high character. It may be impeached; but it is not lightly to be presumed that parties, who put their contracts into writing with all the usual forms and solemnities which belong to it, intend a different contract from that which the written agreement plainly expresses. It belongs to him who impeaches it to show by satisfactory evidence that it is a simulated contract" (p. 423 of 19 F. C.). (See also p. 60 of Appendix U of our main brief.)

Respondents go on to assert that under the common law rules as to agency, the "K" Line was also bound *in personam*, since the master was the employee of the "K" Line. But what of it? As was said by Judge (later Mr. Justice) Brown in *The Home*, 18 N. B. R. 557, Fed. Cases No. 6657, when an owner and a charterer and the vessel are all bound, "the release of one does not impair the remedy against the others" (p. 447 of 12 Fed. Cases).

The language quoted by respondents (p. 26) from this Court's decision in *Pendleton v. Benner Line*, 246 U. S. 353, is not contrary to our contention that this form of bill of lading binds the vessel *in rem*. That case merely holds that the cargo owners could also sue the charterer *in personam* "if they had elected to sue it" (p. 355 of 246 U. S.). See also *Gais Line S. S. Co. v. Wilhelmsen*, *supra*, at pp. 3-4, and the other cases there cited and also those cited at page 17 of our main brief.

In fact, respondents' main argument (p. 29 *et seq.*) is built upon the existence of this *concurrent* liability *in personam* of the "K" line in this case. Its contention that

such *in personam* liability is the measure of the vessel's liability *in rem* rests upon the reasoning of the lower Court herein as set forth in the quotation at page 39 of respondents' brief. A comparison of that quotation with the quotation from Mr. Justice Bradley's opinion in *The City of Norwich*, 118 U. S. 468, set forth at page 6 of respondents' brief, discloses that the former is in essence a paraphrase of the latter. In the appendix to this brief (pp. 30-40, *infra*) we have made a detailed analysis of this reasoning and have shown that it rests upon common law concepts and is in square conflict with the well settled principles of our admiralty law. (See particularly pp. 36-39, *infra*.) We shall, therefore, here merely point out that the fallacy of respondents' argument as to the ship's *in rem* liability being restricted to the *in personam* liability of the charterer under the contracts of affreightment consists in ignoring well settled principles of law. It ignores the fact that the *in personam* liability is merely the basis of a *concurrent* remedy whereby the cargo owner, when it exists and is not subject to statutory limitation, can obtain full recovery and that such liability in the case of a master's bill of lading is created by common law principles of agency.* The maritime lien or right *in rem* is, on the other hand, purely the creation of the maritime law. "This sort of proceeding against personal property is unknown to the common law and is peculiar to the process of courts of admiralty." *The Yankee Blade*, 19 How. 82, at p. 89. At page 24 and pages 31-32 of our main brief, we have pointed out that Judge Ware in *The Phebe*, 1 Ware 263, Fed. Cases No. 11,064, has traced the origin of the maritime lien for breach of a contract of affreightment and has shown that it is derived not from the common law or even from the civil law but had "its origin in the maritime usages

* It is of interest to recall that at one time some of the Justices of this Court thought that *in personam* liability on contracts of carriage could not be enforced in admiralty. See the dissenting opinions in *N. J. Steam Navig. Co. v. Merchants' Bank*, 61 How. 344, at pp. 416, 418, 421-2.

of the middle ages; and it is to these usages that we must look to ascertain its true character" (p. 420 of 19 Fed. Cases).* Judge Ware there went on specifically to point out that "it is by no means correct to say that the liability of the vessel is merely collateral or accessory to that of the owner" (p. 421 of 19 Fed. Cases). Respondents' contentions to the contrary amount to an attempt to escape the well-settled rule as succinctly stated by the present Chief Justice in *Krauss Bros. Lumber Co. v. Dimon S. S. Corp.*, 290 U. S. 117, at p. 121, that once the cargo is laden on board, the ship itself "is made answerable for non-performance", and that, as there pointed out, "this engagement of the vessel or its hypothecation" is a separate liability "as distinguished from the personal obligation of the owner" (p. 121 of 290 U. S.):

Specifically, respondents assert that "there is no liability on the ship unless there is liability upon the owner or operator under the contract of affreightment" (p. 29 of their brief**). Indeed, this assertion appears to be the

* In spite of our extended discussion of *The Phœbe* in our main brief, respondents refer to it only in a single sentence in a footnote at p. 29 of their brief where it is suggested that its rulings are "contrary to prevailing authority". *The Phœbe* was specifically approved by this Court in *Schooner Freeman v. Buckingham*, 18 How., 182, at p. 189, which has since been cited with apparent approval many times, including *Osaka Shosen Kaisha v. Lumber Co.*, 260 U. S. 490, at p. 496, which in turn was cited and apparently relied upon in *Krauss Bros. Lumber Co. v. Dimon S. S. Corp.*, 290 U. S. 117, 121, where the present Chief Justice also cited with apparent approval both the *Freeman* case, *supra*, and also *The Rebecca*, 1 Ware 188 (Fed. Cases No. 11,619). In the latter case, Judge Ware set forth the same principles as in *The Phœbe*. See our discussion of *The Rebecca* at p. 8, *supra*.

** Previously at p. 27 of their brief respondents stated that "In fact no bill of lading is necessary for the creation of such a lien. *The Saturnus* (C. C. A. 2d), 250 F. 407". (See also the quotation from *The Poznan*, 276 Fed. 418, 432, set forth at lines 14-15 of the footnote on p. 29 of respondents' brief that "Indeed the cargo would have a 'privilege' against the ship for right delivery, even without any bill of lading".) The foregoing admissions also show the inaccuracy of respondents' statement above quoted.

keystone of their argument. Respondents' statement is, however, in direct conflict with the law laid down by this Court in *Schooner Freeman v. Buckingham*, 18 How. 182, at p. 189. In that case the same argument was made; and this Court commented upon the fact that it has been

laid down by the high court of admiralty in England (*The Druid*, 1 Wm. Rob. 399), that "in all causes of action which may arise during the ownership of the persons whose ship is proceeded against, I apprehend that *no suit could ever be maintained against a ship, where the owners were not themselves personally liable*, or where their personal liability had not been given up, as in bottomry bonds by taking a lien on the vessel. *The liability of the ship, and the responsibility of the owners in such cases, are convertible terms; the ship is not liable if the owners are not responsible; and vice versa, no responsibility can attach on the owners if the ship is exempt and not liable to be proceeded against*" (p. 189 of 18 How.). (Italics ours.)

The Court then continued and stated that

"under our admiralty law, contracts of affreightment, entered into with the master, in good faith, and within the scope of his apparent authority as master, bind the vessel to the merchandise for the performance of such contracts, wholly irrespective of the ownership of the vessel, and whether the master be the agent of the general or the special owner" (p. 189 of 18 How.). (Italics ours.)

Respondents' contentions in the instant case that "the lien was inseparably connected with the *in personam* liability of" the "K" Line (p. 34) and that since the "K" Line was freed from this *in personam* liability by virtue of the provisions of the Fire Statute, "it follows that the vessel was likewise freed" (p. 30) are identical with the italicized portions of the opinion in the *Druid* case, *supra*, which

this Court, speaking through Mr. Justice Curtiss, quoted as being contrary to "our admiralty law". The *Freeman* case, *supra*, has often been cited and quoted with full approval. It apparently was one of the main authorities relied upon by this Court in *Krauss Bros. Lumber Co. v. Dimon S. S. Corp.*, 290 U. S. 117, 121.

Respondents quote (p. 31) from the majority opinion of Mr. Justice Holmes in *The Western Maid*, 257 U. S. 419, a case involving a collision between two vessels, one of which was owned by the United States. The first part of this quotation, *i. e.*, the part before the asterisks, to the effect that the rules of the general maritime law govern in our courts only when accepted in this country, affords no support to respondents' attempts to escape the rule of the general maritime law that the liability of the ship *in rem* for breach of the contract of affreightment is primary and not merely collateral to that of the owner since in *Schooner Freeman v. Buckingham*, 18 How. 182, this Court, after referring to Judge Ware's opinion in *The Phebe*, *supra*, specifically said (p. 189):

"So far as respects such contracts made by the master in the usual course of the employment of the vessel, and entered into with a party who has no notice of any restriction upon that apparent authority, those maritime usages may safely be considered to make part of our law; * * *" (p. 189 of 18 How.).

The other part of the quotation (at p. 31 of respondents' brief) from *The Western Maid*, *supra*, is, we presume, intended to bolster that portion of the lower Court's opinion herein, quoted at p. 30 of respondents' brief, which refers to the concept "of the ship as a jural person capable of wrongdoing" as being but "a bit of mythology, a fiction." * * * (R. 63). We have shown under Divisions II and III of our main brief that this concept is one

fundamental to the operation of our admiralty law* and one that has been employed by Congress in providing machinery for the enforcement of many statutes. It is, however, to be borne in mind that in the instant case the maritime liens sought to be enforced by your petitioners do not so much rest upon the personification of the ship as they do upon its hypothecation as security for the performance of the contracts of carriage evidenced hereby bills of lading executed "For Master".

When all is said and done, counsel for the respondents is forced to admit that even under his interpretation of the contract of carriage, there existed "a maritime lien upon the 'Venice Maru' for damage by fire to her cargo" (p. 24 of respondents' brief). This admission of the existence of maritime liens is conclusive of the case in favor of petitioners, unless this Court is prepared to change the concept, long well-settled in our admiralty law, that a maritime lien is a *jus in re* which follows the vessel even into the hands of a *bona fide* purchaser, and which is "to be divested only by a proceeding *in rem*" (p. 89 of 19 How.). A suit *in rem* is not

"an action against any particular person to compel him to do or forbear any thing; but a claim against all mankind; a suit *in rem*, asserting the claim of the libellant to the thing, as against all the world" (30 Fed. Cas. at p. 876).

It is a suit "to which no person is made a party, save by his voluntary intervention and claim" (30 Fed. Cas. at p. 876). See *The Yankee Blade*, 19 How. 82, particularly at page 89 *et seq.*, from which we quoted in

* In view of respondents having quoted from Mr. Justice Holmes, it is of interest to recall that in his treatise on *Common Law* he said at pages 26-7: "It is only by supposing the ship to have been treated as if endowed with personality, that the arbitrary seeming peculiarities of the maritime law can be made intelligible, and on that supposition they at once become consistent and logical."

part at pages 19-20 of our main brief. See also the quotation from Mr. Justice Curtis's opinion in *The Young Mechanic*, 2 Curt. 404; Fed. Cas. No. 18,180, as set forth at pages 20-21 of our main brief, as to a maritime lien being a liability separate and distinct from the owner's personal liability and unaffected by any disability to sue such owner. See also quotation from Mr. Justice Grier's opinion in *The Creole*, 2 Wall. Jr. 485, Fed. Cas. No. 13,033, as set forth at pages 28-29 of our main brief, and *The Home*, 18 N. B. R. 557, Fed. Cas. No. 6657, discussed at p. 21, *supra*, and at p. 40, *infra*.

In closing, we deny the charge at p. 24 of respondents' brief that we have abandoned "any defense of the decision of the Circuit Court of Appeals for the Fifth Circuit in *The Etna Maru*, 33 F. (2d) 232", certiorari denied 280 U.S. 603. We have not dwelt on the opinion in that case because it speaks for itself. Our arguments are, we submit, entirely consistent with, and fully support, the position taken by the Court in that decision.

CONCLUSION.

Petitioners' admitted maritime liens against the "Venice Maru" should be enforced irrespective of any exoneration afforded the respondents *in personam* by the Fire Statute.

Respectfully submitted,

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October 19, 1943.

Appendix.

(Analysis of *The City of Norwich*, 118 U. S. 468.)

Respondents' contention that the Fire Statute (Sec. 1 of the Act of March 3, 1851, now 46 U. S. Code, Sec. 182) should be construed to extinguish maritime liens, *i. e.*, the ship's liability *in rem*, as well as to release the owner from liability *in personam* when fire, pleaded as an excuse for non-delivery or damage to cargo, is not due to the design or neglect of such owner personally, basically rests upon their interpretation of the case of *The City of Norwich*, 118 U. S. 468, and particularly upon a paragraph (quoted at p. 6 of their brief) from the majority opinion* written by Mr. Justice Bradley which was in essence paraphrased by the lower Court in the instant case (R. 63). That case was a limitation proceeding instituted under Section 3 of the Act of March 3, 1851 (now 46 U. S. Code, Sec. 183) by the owners of the "City of Norwich" in respect of claims arising out of a collision between that steamer and the schooner "Van Vliet". The claimants-appellants were (a) the schooner owners who had obtained in a prior action (*Wright v. Norwich Co.*, Fed. Cases No. 18,087, aff'd 13 Wall., 104) a decree *in personam* for the loss of their vessel and its cargo (under well settled principles they were also vested with a maritime lien),** and (b) the owners of the cargo on board the "City of Norwich" who had obtained a decree *in rem* in still another action (*Place et al. v. The City of Norwich*, Fed. Cases No. 2760) instituted "after the steamboat had been raised and carried to the shore of Long Island and repaired" (p. 470 of 118 U. S.). In this latter action Judge Benedict ruled that the proximate cause of the loss of the cargo was the collision brought about by the negligent navigation of the "City of Norwich" and not the fire which followed the collision and "that the first section of the act (the Fire Statute) can have no application in a case where fire is but an incident of a collision" (p. 781 of 5 Fed. Cas.). In the subsequent limitation proceedings no de-

* Justices Matthews, Miller, Harlan and Gray dissented. The dissenting opinion starts at page 526 of 118 U. S.

** This was pointed out by this Court at page 122 of 13 Wall. when the case was before this Court the first time.

fense based on the Fire Statute was raised. That statute is not mentioned in Mr. Justice Bradley's opinion. In short, the limitation proceedings passed upon by this Court merely involved the proper interpretation and application of Section 3 of the Act of March 3, 1851.

None of the questions actually presented for decision in the *City of Norwich* are directly involved in the case at bar.

The principal question was whether the vessel owner, in order to obtain the benefit of Section 3 of the Act, was required to pay into the limitation fund the proceeds of the insurance received by him in respect of the loss of his ship. This Court held that the phrase, "interest in the vessel", as used in the statute "was intended to refer to the extent or amount of ownership which the party had in the vessel" (p. 493 of 118 U. S.), and was not broad enough to include the proceeds of an insurance policy on the ship. Manifestly, that part of the opinion has no relevancy here.

Two other questions were also presented; viz., (1) at what time should the value of the vessel be taken to fix the amount to be surrendered in the limitation proceedings, *i. e.*, before or after the loss? and if after, at what time thereafter? and, (2) whether the limitation provisions of Section 3 were applicable to an action *in rem*, *i. e.*, whether such action could be superseded by the filing of a limitation proceeding and the libellants in such action be restricted to collecting their claims from the value of the vessel surrendered in the limitation proceedings along with other claims against the fund?*

As to the first of these two questions, this Court through Mr. Justice Bradley said (p. 490) that it had

"been repeatedly answered by the decisions of this Court. We held in *Norwich Co. v. Wright*, and have held and decided in many cases since, that the act of Congress adopted the rule of the maritime law as

*The precise question is not here involved. Such of your petitioners as had filed actions *in rem* against the "Venice Maru" prior to the institution of this proceeding (R. 5) have been stayed from proceeding with such actions (R. 12-14—see also p. 54), and have filed their claims herein along with others who had not yet filed suit when this proceeding was begun.

contradistinguished from that of the English law on this subject; and that the value of the vessel and freight after, and not before, the collision is to be taken" (p. 490 of 118 U. S.). (Italics ours.)

Mr. Justice Bradley concluded that the vessel was to be appraised at her value at the end of the voyage and said (pp. 491-2):

"This conclusion is corroborated by Sec. 4285, which declares that it shall be a sufficient compliance with the requirements of the law if the owner shall transfer his interest in the vessel and freight to a trustee for the benefit of the claimants. In most cases this cannot be done until the voyage is ended, for, until then, the embezzlement, loss, or destruction of property cannot be known.

And this was manifestly the maritime law, for by that law the abandonment of the ship and freight (when not lost) was the remedy of the owners to acquit themselves of liability; and, of course, this could only be done at the termination of the voyage. If the ship was lost, and the voyage never completed, the owners were freed from all liability. Boulay, Paty, Droit Com. Mar., tit. III, sec. 1, vol. I, pp. 263, 275, &c.; Emerigon, Contrats à la grosse, ch. 4, sec. 11, Secs. 1, 2; Valin, Com. lib. II, tit. VIII, art. II; Consolato del Mare, chs. 34, (141) 186, (182) 227, (194) 239; 2 Pardessus, Collection des lois Maritimes antérieur au XVIII. Siecle; Cleirac, Nav. de Rivieres, art. XV." (Italics ours.)*

He went on to point out that (p. 492) "any salvage operations, undertaken for the purpose of recovering from the bottom of the sea any portion of the wreck, after the disastrous ending of the voyage as above supposed, can

* See also *The Phœbe*, J. Ware 263, Fed. Cases No. 11,064, where Judge Ware demonstrated that under the general maritime law the liability of the vessel for the breach of the master's bill of lading was the primary one "and that of the owner was not personal but merely incidental to his ownership, from which he was discharged either by the loss of the vessel or by abandoning it to the creditor." 49 Fed. Cas. at p. 421. Judge Ware there also pointed out that both ship and freight were hypothesized to secure performance of the master's contract. See also *The Scotland*, 105 U. S. 24 at p. 28.

have no effect on the question of the liability of the owners" (p. 492 of 118 U. S.).

This position is consistent with the rule of the general maritime law that, in the absence of personal fault, the vessel owner's liability is restricted to the capital at risk on the voyage on which the loss occurs. *The Rebecca*, 1 Ware 188, Fed. Cases No. 11,619; *The Phœbe* 1 Ware 263, Fed. Cases No. 11,064; see also Mr. Justice Bradley's observations in *Norwich Co. v. Wright*, 13 Wall. 104, at p. 116, and those of Mr. Justice Brown in *The Main v. Williams*, 152 U. S. 122, at p. 131.

In the case at bar petitioners do not seek to recover from the "Venice Maru" anything in excess of the ship and pending freight as represented by the stipulation filed herein.

As to the question whether the plea of limitation of liability could be received in an action *in rem*; i. e., whether such an action was superseded by a limitation proceeding and the libellant's rights transferred to the limitation fund representing the value of the vessel, Mr. Justice Bradley stated (p. 502) that the argument to the contrary there advanced

"overlooks the fact that the law gives a twofold remedy—surrender of the ship, or payment of its value; and declares that the liability of the owner, in the cases provided for, shall not exceed the amount or value of his interest in the ship and freight.* This provision is absolute, and the owner may have the benefit of it, not only by a surrender of the ship and freight, but by paying into court the amount of their value, appraised as of the time when the liability is fixed. This, as we have seen, enables the owner to reclaim the ship, and put it into complete repair, without increasing the amount of his liability. *The absolute declaration of the statute*, that his liability shall not exceed the amount or value of the ship and freight, to wit, at the termination of the voyage, *has the effect, when that amount is paid into court, under judicial sanction, of discharging the owner's liability, and thereby of extinguishing the liens on the vessel itself and of transferring those*

* This is precisely what is due in the *in rem* action. *The Phœbe*, *supra*, see appendix our main brief at page 54.

liens to the fund in court. This is always the result when the owner is allowed to bond his vessel by payment of its appraised value into court, or by filing a stipulation with sureties in lieu of such payment. *The vessel is always discharged from the liens existing upon it, when it has been subjected to a judicial sale by order of the admiralty court, or when it has been delivered to the owner on his stipulation with sureties.*" (Italics ours.)*

From the foregoing it is clear that the decision of this Court in no way affected the existence of the maritime liens against the "City of Norwich", but merely held that they were transferred to the fund in the court representing her value at the end of the voyage during which such maritime liens arose, which both under the statute and the maritime law was limited to the value of the vessel and her pending freight: *The Phebe, supra.* See page 54 of our main brief. The value of the "City of Norwich" after the collision had been found to be \$2,500 (p. 471 of 118 U. S.) whereas her value at the time the *in rem* libels were filed after she had been salvaged and repaired, was appraised as \$70,000. (p. 471 of 118 U. S.). The appellants there contended that they were entitled to recover that latter sum.

Mr. Justice Bradley dealt with this contention at page 503 of 118 U. S. and ruled that "the claim that the lien attaches to the repairs and betterments which the owner puts upon the vessel after the amount of his liability has been fixed is repugnant to the entire drift and spirit of the statute" (p. 503 of 118 U. S.). Such a ruling in that case was in complete harmony with the general maritime law as to the extent of the liability of an innocent shipowner

* The rule that the giving of a bond transfers the lien to it and discharges the vessel is well-settled. *The Susana*, 2 F. (2d) 410, 412 (C. C. A. 4); *Gray v. Hardware Co.*, 32 F. (2d) 876 (C. C. A. 5), and cases cited there at page 878. It is also well-settled that in a purely *in rem* action, no decree *in personam* can be entered for any damages which the value of the vessel or bond fails to satisfy. *The Monte A.*, 12 Fed. 331, at pp. 334-5. See also *The Virgin*, 8 Peters 538, and *The Volant*, 1 W. Rob. 383, 166 Eng. Reprints 616. The same rule applies in favor of stipulators for value. *The Ann Caroline*, 2 Wall. 538 at pp. 548-9.

for the acts of the master and crew of his vessel. As Mr. Justice Bradley had previously pointed out in *Norwich Co. v. Wright*, 13 Wall. 104, at pp. 119-120, and also in *The Scotland*, 105 U. S. 24, at p. 28, the purpose of the Act of March 3, 1851, was to incorporate into our jurisprudence the rule of the general maritime law on this point which "was not received as law in England nor in this country until made so by statute" (p. 28 of 105 U. S.). Under the general maritime law, the vessel owner's liability, in the absence of personal fault, was restricted to the capital at risk on the voyage on which the loss occurred. *Norwich Co. v. Wright, supra*, at page 116, and *The Scotland, supra*, at page 28, both of which refer to *The Rebecca*, 1 Ware 188, Fed. Cases No. 11,619, for further authorities. To like effect see also *The Phebe*, 1 Ware 263, Fed. Cases No. 11,064; Appendix C of our main brief.* The reason for the rule is particularly plain in cases involving maritime liens (such as those in the case at bar) arising from the hypothecation of the vessel and freight for the fulfillment of the obligations created by a master's bill of lading. *The Phebe, supra* (see p. 54 of our main brief). It would be obviously unfair to hold as security for such obligation any additional capital which an innocent vessel owner might have invested in a subsequent voyage. The maritime law is clear on this point that nothing is hypothecated beyond the vessel and freight on the particular voyage involved (*The Phebe, supra*); and obviously when a voyage is broken up by the vessel's sinking as was the case in *The City of Norwich*, any sums expended either by way of salvage or repairs have nothing to do with that voyage and are not subject to the maritime lien.

Mr. Justice Bradley's ruling that in cases where the shipowner establishes his right to the benefits of the Act of March 3, 1851, i. e., shows that the loss occurred without his personal fault or knowledge, the lien for damage occurring on that voyage does not attach to any increase in the "value of the ship (which) may have come to be

* Compare the full liability imposed on the vessel owner for loss of cargo by fire not due to the owner's personal fault by the ruling in *N. J. Steam Navigation Co. v. Merchants' Bank*, 6 How. 344, which admittedly led to the passage of the Act of March 3, 1851. See page 9 of respondents' brief as well as note on page 8 of our main brief.

by means of alterations or repairs" (p. 503 of 118 U. S.) made by the owner subsequent to the voyage on which the amount of his liability was fixed, precedes on the same page the quotation from his opinion which is set forth at page 6 of respondents' brief and which starts with the sentence reading: "To say that an owner is not liable, but that his vessel is liable, seems to us like talking in riddles" (p. 503 of 118 U. S.). We submit that a correct interpretation of these remarks in view of their context is that Mr. Justice Bradley merely was giving an additional reason for his ruling and only meant that an owner's interest in the vessel on a subsequent voyage after fresh capital has been added, i. e., his interest in the vessel over and above its value at the time the maritime lien attached,* could not be held liable or sold in cases where, under the statute, the owner was not personally liable for any amount in excess of the maritime lien which had been transferred to the fund paid by him "into court under judicial sanction". This would seem particularly so since he had just pointed out on the preceding page that the liens against the "City of Norwich" had been transferred to the limitation fund and the vessel itself thereby discharged.

If, however, by the language under discussion Mr. Justice Bradley intended to go further and to rule that an admiralty action *in rem* to enforce a maritime lien was in fact merely another means of enforcing a personal liability,** then such statements are *obiter dicta*. Such a ruling would ignore the fact that by the well-settled maritime law the ship becomes bound *in rem* by the contract of the master or of her bareboat charterer wholly independently of any liability on the part of her

* In this connection we might point out that a maritime lien, or *jus in re*, is inchoate until it is carried into effect by judicial process at which time it relates back to the period when it first attached". See *The John G. Stevens*, 170 U. S. 113 at p. 115, and cases there cited, and also p. 122, where Mr. Justice Gray, speaking for this Court, said: "The collision, as soon as it takes place, creates, as security for the damages, a maritime lien or privilege, *jus in re*, a proprietary interest in the offending ship, and which, when enforced by admiralty process *in rem*, relates back to the time of the collision".

** The paraphrase employed by the lower Court in the instant case has this effect (R. 63).

owner; and would be squarely in conflict with the settled principles of the maritime law as to the nature of an admiralty proceeding *in rem* as laid down both before and since.* It could only rest upon common-law doctrine.** In this latter connection, it is to be noted that Mr. Justice Bradley quotes from his own opinion in *Boyd v. United States*, 116 U. S. 616, 637, that a proceeding *in rem* for forfeiture under the customs laws is in effect "a proceeding against the owner of the property as well as against the goods". This statement is squarely in conflict with this Court's holding in the *Brig Malek Adhel*, 2 Howard 210; *The Scow 6-S*, 250 U.S. 269; and numerous other decisions of this Court discussed under Heading III of our main brief at pages 36 *et seq.*

The *Boyd* case was an information for forfeiture of goods under Section 12 of the Act of June 22, 1874 (18 Stat. 186), which declared that "any owner, importer, consignee, agent or other person who shall, with intent to defraud the revenue, make, or attempt to make, any entry of any imported merchandise" whereby the United States shall be deprived of lawful duty thereon, shall be subject to a fine or imprisonment "and, in addition to such fine, such merchandise shall be forfeited" (18 Stat. 186). Pursuant to the provisions of Section 5 of the same Act, the trial Court by order had compelled the claimant to produce an invoice covering another transaction which was received in evidence over the claimant's objection. The question thereby presented was whether this procedure contravened the claimant's constitutional rights safeguarded by the Fourth and Fifth Amendments. This Court held that it did in that case on the ground (p. 638) that

"although the owner of goods, sought to be forfeited by a proceeding *in rem*, is not the nominal party,

* *The China*, 7 Wall. 53, and other cases cited under Division H of our main brief, pages 26-34. See also *The Yankee Blade*, 19 How. 82, 89, and cases cited at pages 19-22 of our main brief.

** That the principles and rules followed in admiralty are different from, and are to be contradistinguished from, those of the common law, has been recognized from the earliest times. *Mauro v. Almeida*, 40 Wheat. 473, at p. 488. See also 1 Stat. 276. The action *in rem* to enforce a maritime lien "is unknown to the common law, and is peculiar to the process of courts of admiralty" per Grier, J., in *The Yankee Blade*, 19 How. at p. 89.

he is, nevertheless, the substantial party to the suit; he certainly is so, after making claim and defence; and, in a case like the present, he is entitled to all the privileges which appertain to a person who is prosecuted for a forfeiture of his property by reason of committing a criminal offense" (p. 638 of 116 U. S.).

It is to be seen that personal rights wholly separate and distinct from the question of the liability of the *res* to forfeiture were involved in that quasi-criminal proceeding. In *Stone v. United States*, 167 U. S. 178 at pp. 187-188, this Court subsequently took occasion to point out that the rules applicable in such a type of proceeding "can have no application in a civil case not involving any question of criminal intent or of forfeiture for prohibited acts, but turning wholly upon an issue as to the ownership of property" (p. 188 of 167 U. S.). A fortiori, such ruling can have no application in an admiralty proceeding to enforce rights *in rem* created by the maritime law which are wholly distinct from any liability of the vessel owner *in personam*.

The common-law basis of the ruling in the *Boyd* case, as set forth in *The City of Norwich, supra*, is farther emphasized by the reliance there placed by Mr. Justice Bradley on the language of Vaughan, C. J., in *Sheppard v. Gosnold*, Vaugh. 159. In that case (124 Eng. Reprints 1018), the Crown asserted a claim for duties in respect of goods washed up on shore and taken by a landowner as his own. The case could have been decided by a mere holding that the statute imposing the duties was not applicable because it related solely to goods intentionally brought into the Kingdom. The Court of Common Pleas, however, went further in its observations, which were quite sound common law doctrine, but at variance with the principles of our maritime law. Contrast the common law view of Chief Justice Vaughan, when he says: "Goods, as goods, cannot offend, forfeit, unlade, pay duties, or the like, but men whose goods they are", with those of Chief Justice Marshall in *United States v. The*

Schooner Little Charles, 1 Brock. 347, 354, Fed. Cases No. 15,612, where he said:

"But this is not a proceeding against the owner; it is a proceeding against the vessel for an offence committed by the vessel, which is not the less an offence, and does not the less subject her to forfeiture, because it was committed without the authority, and against the will of the owner. It is true, that inanimate matter can commit no offence. The mere wood, iron, and sails of the ship, cannot, of themselves, violate the law. But this body is animated and put in action by the crew, who are guided by the master. The vessel acts and speaks by the master. She reports herself by the master. It is, therefore, not unreasonable that the vessel should be affected by this report" (p. 982 of 26 Fed. Cas.).

Chief Justice Marshall's views were approved by this Court in *United States v. Brig Malek Adhel*, 2 How. at p. 233. Compare also *The China*, 7 Wall. 53, and other cases cited in our main brief. The doctrine laid down by Vaughan, *C. J.*, is in square conflict with the rule adopted by Congress in the Airplane Statute (49 U. S. Code, Section 181 sub. (b)), discussed at pages 36-38 of petitioners' main brief. In *U. S. v. Batre*, 69 F. (2d) 673, the leading case construing that statute, it was held that where an airplane (in so far as the holder of a chattel mortgage on the plane was concerned) was unintentionally brought into the United States contrary to law, such circumstance did not prevent the forfeiture.

Mr. Justice Bradley's remark in *The City of Norwich*, *supra*, that "To say that an owner is not liable, but that his vessel is liable, seems to us like talking in riddles", * is clearly based on the common law concepts of the *Boyd* and the *Sheppard* cases, *supra*, and is not only in square

* In the instant case Judge Hand said that "To say that an owner is completely exonerated although one may arrest his ship and sell it, is a contradiction in terms" (R. 63).

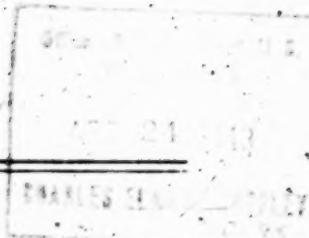
conflict with the admiralty cases, just referred to,* but is also in conflict with this Court's recent holdings in *Goldsmith, Grant Co. v. United States*, 254 U. S. 505, and in *Fan Oster v. Kansas*, 272 U. S. 465, and the other cases discussed under Division III of our main brief. It will be recalled that in both the *Grant* and the *Fan Oster* cases, there was no liability whatsoever on the part of the car owner, but the automobile was nevertheless held liable to forfeiture.

We have also pointed out at pages 78, *supra*, that Mr. Justice Bradley's opinion in this case should be read and interpreted in the light of his opinion in the companion case of *Norwich Corp. v. Wright*, 13 Wall. 104.

In summary, we submit that the actual decision of this Court in *The City of Norwich*, 118 U. S. 468, does not support respondents' position in the instant case and that their interpretation of the language used by Mr. Justice Bradley at p. 503 of his opinion, which was here paraphrased by Judge Hand, is squarely contrary to the well-settled principles of admiralty law as laid down in both prior and subsequent authorities which fully support your petitioners' position herein.

* In addition to those and the other cases in our main brief, attention is directed to the decision of Judge (later Mr. Justice) Broyn in *The Home*, Fed. Cases No. 6657, a libel *in rem* to enforce a lien for supplies furnished the vessel upon the order of a demise charterer. The latter went into bankruptcy and proposed a composition with his creditors which was accepted by the requisite number including the libellant. In enforcing the lien, Judge Brown pointed out: "Under general admiralty rule 12, a person furnishing supplies to a vessel has a triple security for the payment of his claim: (1) The owner, a charterer being regarded as the owner *pro rata*; (2) the master; (3) the vessel itself. A failure to collect from either does not impair his remedy against the others. He may pursue them successively until his entire debt is paid. (Cases) * * * but there are in fact three independent though not joint debtors in this case, viz.: The charterer, the vessel, and the master, and *the release of one does not impair the remedy against the others*" (pp. 446-7 of 12 Fed. Cas.). (Italics ours.) See also Mr. Justice Curtis' ruling in *The Young Mechanic*, Fed. Cases No. 18,180 as quoted at page 21 of our main brief.

FILE COPY



IN THE

Supreme Court of the United States

OCTOBER TERM 1942

No. 881

IN THE MATTER

of the

Petition of KABUSHIKI KAISHA KAWASAKI ZOSENJO, Owner,
and KAWASAKI KISEN KABUSHIKI KAISHA, Bareboat Char-
terer of the Steamship "VENICE MARU", for Exoneration
from and Limitation of Liability.

CONSUMERS IMPORT CO., INC., et al.

Cargo Claimants-Petitioners,

KABUSHIKI KAISHA KAWASAKI ZOSENJO and KAWASAKI
KISEN KABUSHIKI KAISHA,

Respondents.

**BRIEF OF RESPONDENTS IN OPPOSITION TO
PETITION FOR WRIT OF CERTIORARI**

GEORGE C. SPRAGUE,
Counsel for Respondents.

New York, N.Y., April 24, 1943.

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PETITION FOR WRIT OF CERTIORARI**

Statement

Counsel for respondents herein, with the approval of the Alien Property Custodian, was retained in January, 1942 by Standard Surety and Casualty Co. of New York, the bonding company which gave the *ad interim* stipulation for respondents in this proceeding, to continue the appeal proceedings in the Circuit Court of Appeals which had been begun before the outbreak of war. The Alien Property Custodian by vesting orders Nos. 77 and 80, both

dated July 30, 1942, vested in himself all property in the United States of Kawasaki Kisen Kabushiki Kaisha, one of the respondents herein.

This cause presents no reason within Rule 28, paragraph 5, for the issuance of a writ of certiorari. Contrary to petitioners' assertions, neither the decision of the Circuit Court of Appeals (R. 2040-56, reported in 133 F. [2d] 781) nor the decision of the District Court (R. 1971-79, reported in 39 Fed Supp. 349) is in conflict with applicable decisions of this Court or with applicable decisions of another Circuit Court of Appeals. Local decisions are not involved since the sole question at issue is the interpretation and applicability of the Federal Fire Statute (Act of March 3, 1851, c. 43, Sec. 1, 9 Stat. 635, now 46 U. S. Code, Sec. 182, formerly R. S. 4282).

The questions involved on this petition are not of general importance nor do they affect the public interest. They merely relate to the application of the Fire Statute, which has been frequently before this Court for interpretation during the ninety-two years since its adoption, to the contractual relationship that existed between petitioners as shippers of cargo upon the *Venice Maru* and respondents, who were respectively owner and bareboat charterer of that vessel. This statute has been recently analyzed and interpreted in *Earle & Stoddart v. Wilson Line (The Galileo)*, 287 U. S. 420, where all doubts as to its scope as a statute of exoneration were set at rest, this Court specifically holding that the duty of making the vessel seaworthy was delegable thereunder, saying:

"The fire statute, in terms, relieves the owners from liability 'unless such fire is caused by the design or neglect of such owner'. The statute makes no other exception from the complete immunity granted" (p. 425).

and

"The courts have been careful not to thwart the purpose of the fire statute by interpreting as 'neglect' of the owners the breach of what in other connections is held to be a non-delegable duty" (p. 427).

The basic points upon which the courts below exonerated respondents from liability to petitioners were firmly established by the decision in *The Galileo*, *supra*, and in the earlier cases in this Court of *Walker v. Western Transp. Co.*, 3 Wall. 150, and *Craig v. Continental Ins. Co.*, 141 U. S. 638.

The Cause Below

On July 5, 1934 the *Venice Maru* at Kobe, Japan, being then partly loaded, lifted 38,000 bags of sardine meal for U. S. Atlantic ports via the Panama Canal, of which 13,312 bags were stowed in No. 1 lower hold, 17,917 bags in No. 3 lower hold and 'tween deck and 6,735 bags in No. 6 lower hold, all shipped by a single consignor. Other general cargo was loaded at Kobe and thereafter the vessel at Nagoya lifted 1,087 cases of porcelain goods which were stowed upon the weather deck, to which deck cargo 595 more cases of porcelain were later added at Yokohama, whence she sailed for destination on July 13, with her holds full and a deck cargo covering most of the free deck space including the after two-thirds of No. 1 weather deck hatch.

The vessel arrived at Los Angeles without mishap, where she discharged a small amount of cargo from No. 1 'tween-decks and thence sailed for Balboa on July 30. On the morning of August 6 smoke was observed coming out of the No. 1 hold ventilators, and an examination showed the sardine meal in that hold to be heating; fire eventually broke out resulting in damage to this and other cargo in holds 1 and 2. After the fire had been extinguished at Balboa, the spoiled cargo removed and the holds affected by the fire cleaned, the undamaged cargo was restowed and the vessel proceeded to New York and her other ports of destination where respondent-charterer demanded general average guarantees or cash deposits to secure payment of cargo's proportion of the general average expenses.

arising out of the steps taken to extinguish the fire. Later a general average was stated.

The owners of the cargo that had been destroyed or damaged by the fire or water used to extinguish it filed libels *in rem* against the vessel and *in personam* against the bareboat charterer (operator) for their damages, whereupon the respondents as owner and bareboat charterer respectively of the vessel filed the petition herein for exoneration from or limitation of liability in which they pleaded the Fire Statute and filed an *ad interim* stipulation for value therein in the sum of \$245,000 with interest as provided by law. Petitioners herein having filed their claims in the proceeding and answered the petition, the cause came to trial on the issues thus joined. Both courts concluded that respondents were entitled to exoneration from liability to claimants under the Fire Statute although they found that the vessel was unseaworthy with respect to the stowage of the sardine meal in No. 1 hold and that this caused the fire, holding that this unseaworthiness in respect to stowage was not neglect or design of the respondents within the Fire Statute since they had delegated the duty of laying out and supervising the stowage of the sardine meal to an expert, Lloyd's agent marine surveyor at Kobe, and that this duty was delegable under the Fire Statute, citing *Earle & Stoddart v. Wilson Line (The Galileo)*, 287 U.S. 420. However, they declined to allow respondent-charterer to retain cash general average deposits, which it had exacted from certain claimants, because the terms of the old form Jason clause in the bills of lading contained phraseology similar to Section 3 of the Harter Act under which the duty to make the vessel seaworthy is non-delegable. The decree exonerated the owner-respondent in all respects with costs as against claimants and exonerated the bareboat charterer-respondent in all respects except as to liability (1) for the return of cash general average deposits to two claimants, and (2) for contribution in general average to certain other claimants.

The material findings of fact are contained in the following quotation from the opinion of the Circuit Court of Appeals:

"The sardine meal laden at Kobe was well within the range of high grade Japanese sardine meal; the bags were proper, and the cargo was fit for carriage by sea from Kobe to New York when properly stowed and ventilated. No. 1 lower hold was from 20 to 23½ feet deep; above it was the lower 'tweendecks' 9½ feet deep, and above that a second 'tweendecks', or shelter deck compartment, 8 feet deep. Six hundred and sixty-five tons of the meal—a little more than one-third of the whole consignment—were stowed in No. 1 hold, and occupied the entire hold except for a space of about a foot or eighteen inches along the bulkheads and along the sides of the ship, and for about the same space between the top of the stow and the overhead deck beams. A channel one foot wide ran athwartship through the middle, except for which the stow was a solid block. Five rows of 'rice ventilators' ran fore and aft in the 5th, 10th and 16th tiers, and six rows athwartship in the 6th, 11th and 17th tiers; vertical ventilators connected these horizontal ventilators at the four corners of the hatch. Besides these there was a permanent ventilating system such as was usual in ships of her class.

Sardine meal, like other fish meal, when stowed on long voyages, is likely to heat and to take fire spontaneously; its susceptibility depends upon the percentage of moisture and oil which it contains. It had been a common cargo from Japan to Pacific coast ports in small parcels for five or more years before this voyage of the 'Venice Maru', and no damage had ever occurred; the charterer had itself successfully carried it on over eighty voyages before September 1, 1933, and in one of these, that of the S.S. 'Florida' on December 23, 1930, the cargo was nearly as great as on the 'Venice Maru'. The charterer's first shipment to Atlantic ports was on February 3, 1933, followed by eight other steamers—the largest consignment in which was 1100 tons; all came through undamaged. On September 1, 1933, however, the cargo of the 'Montreal Maru', which had left Yokohama with 2300 tons, was found to have been in part heated at its outturn in

New York on October 6. Three steamers followed to New York without incident, but on December 6th, the 'Soyo Maru', which had left Yokohama on October 28, arrived in New York with about 1000 tons, also heated. Ten ships then followed to New York all without damage. On April 5, 1934, the 'Soyo Maru' again left Yokohama with 1100 tons; the 'Tohsei Maru' on the 25th with 560 tons; the 'Nichiyo Maru' on the 28th with 1117; and the cargoes of all three heated. In the case of the last two this happened in spite of the use of 'rice ventilators'. The charterer attributed this to the quality of the meal itself, which had been manufactured at a small factory near Nagoya; and for that reason it refused to take any further meal from that shipper. Two cargoes were then despatched and arrived in good condition; but not so, the cargoes of the 'Montreal Maru' leaving Yokohama on June 14th and arriving in New York on July 20th, or of the 'Getsuyo Maru', leaving Yokohama on June 28th, and arriving in New York on July 29th. Although neither of these last two vessels contained any Nagoya meal and both carried 'rice ventilators', the cargo of each heated.

After the charterer learned of the damage done on the three ships leaving in April, the latest of which, the 'Tohsei Maru', arrived on June 1st, it not only gave directions to take no more of the Nagoya meal, but it retained one, Fegen, to take charge of the stowage of any future shipments, and the first ship which he stowed was the 'Getsuyo Maru'. He had been a marine surveyor for 23 years, all the time in Kobe acting as Lloyd's agent; he had surveyed all sorts of cargoes including sardine meal; before becoming a surveyor he had had twenty years sea experience from seaman to captain; and he held a master's license both on British and Japanese ships. Although as a master he had never carried sardine or other fish meal, he had frequently carried another perishable cargo, rice, and was familiar with the use of 'rice ventilators'. It was he who had stowed No. 1 lower hold of the 'Venice Maru' in the way we have described. The charterer's business was in charge of one, Okubo, who lived in Kobe, and who alone had the active direction of its affairs, although it had a president, who was inactive. Okubo knew of the previous heating of

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all the cargoes mentioned except those leaving in June; he did not tell Fegen of these when he retained him, and he paid no further attention to the stowage" (R. 2041-43).

Argument

Petitioners' argument involves four distinct propositions, as follows:

- A. That the burden of proving design and neglect of the shipowner is not upon the cargo owner under the Fire Statute (question III of petition and Point III of supporting brief).
- B. That the Fire Statute, while exonerating the ship-owner from liability *in personam*, leaves him liable to the extent of the value of his ship (question V of petition and Point V of supporting brief).
- C. That the acceptance for transportation of hazardous cargo like sardine meal, when stowage thereof was still "in flux", constituted "design or neglect" of respondents within the Fire Statute (questions I and IV of petition and Points I and IV of supporting brief).
- D. That delegation by respondents of the duty of laying out and supervising the stowage of hazardous cargo, like sardine meal, to a stowage expert, without informing him of five instances of heating of this commodity that had occurred on the 112 voyages of respondents' vessels, was "neglect" within the Fire Statute (question II of petition and Point II of supporting brief).

None of these four propositions can be sustained as I shall now show.

POINT I

(Answering Proposition A)

The Circuit Court of Appeals was correct in its holding below that under the Fire Statute (46 U. S. C. 182) the burden is on cargo-claimants to prove that the fire was caused by the "design or neglect" of the shipowner in order to deprive the shipowner of the complete immunity given by the statute; this holding is not in conflict with decisions of other Circuit Courts of Appeal or of this Court.

Petitioners urge that the Circuit Court of Appeals for the Second Circuit erred in holding below that the burden is on the cargo owners to show "neglect" under the Fire Statute and that such holding is in conflict with decisions in other Circuits (petition, question III, pp. 14-17; brief, Point III, pp. 31-37). They complain because the Court "does not state why" there should be a distinction between the first and third sections of the Act of March 3, 1851 as respects burden of proof (petition, p. 14).¹ But the

¹ The first section of the Act is the Fire Statute; the third section is the Limitation of Liability Statute. They are as follows:

- (1) "No owner of any vessel shall be liable to answer for or make good to any person any loss or damage, which may happen to any merchandise whatsoever, which shall be shipped, taken in, or put on board any such vessel, by reason or by means of any fire happening to or on board the vessel, unless such fire is caused by the design or neglect of such owner" (46 U. S. C. 182).
- (3) "The liability of the owner of any vessel, for any embezzlement, loss, or destruction, by any person, of any property, goods, or merchandise, shipped or put on board of such vessel, or for any loss, damage, or injury by collision, or for any act, matter, or thing, loss, damage, or forfeiture, done, occasioned, or incurred without the privity, or knowledge of such owner or owners, shall in no case exceed the amount or value of the interest of such owner in such vessel, and her freight then pending" (46 U. S. C. 183).

(I have followed petitioners' method of quoting from the original Act of March 3, 1851, although Section 3 thereof was amended on August 29, 1935 and June 5, 1936, in certain respects totally immaterial to the issues herein.)

reasons for such distinction are self-evident when one considers the difference in wording between the two sections. The relevant part of the first section is as follows:

*"No owner of any vessel shall be liable *** for *** loss or damage *** by means of any fire *** unless such fire is caused by the design or neglect of such owner"* (46 U. S. C. 182).²

The relevant part of the third section is as follows:

*"The liability of the owner of any vessel *** for any loss, damage or injury *** done, occasioned, or incurred without the privity, or knowledge, of such owner *** shall in no case exceed the amount or value of the interest of such owner in such vessel, and her freight then pending"* (46 U. S. C. 183).

The distinction between the emphasized word "unless" in the first section and the emphasized word "without" in the third section is obvious. The words "*unless caused by the design or neglect*" in the first section connote an exception to the complete immunity already given; the words "*without the privity or knowledge*" in the third section connote a condition precedent to the owner's obtaining limitation of liability. It necessarily follows that under the first section cargo claimants must prove that the ship-owner's design or neglect caused the fire in order to deprive it of immunity, although under the third section the ship-owner must prove that the loss occurred without its privity or knowledge in order to obtain limitation of liability.

Contrary to what one might infer from petitioners' brief, none of the American cases cited therein (*Walker v. Transportation Co.*, 3 Wall. 150; *Earle & Stoddart v. Wilson Line*, 287 U. S. 420; *Providence etc. Co. v. Hill Manufacturing Co.*, 109 U. S. 578, or *Bank Line v. Porter*, 25 F. [2d] 843) even discussed the burden of proving design or neglect under the Fire Statute, much less held that such burden was not upon cargo owners. Whenever the Circuit Court

² Emphasis throughout brief is mine unless otherwise noted.

of Appeals in any Circuit has directed its attention to this issue, it has recognized that this burden is left on cargo owners by the terms of the statute.

The decision of the District Court for the Eastern District of South Carolina in *Charbonnier et al. v. United States*, 45 F. (2d) 166, held that the burden was upon the cargo owner in the following words:

"It is true that the burden under the Fire Statute is not upon the shipowner to show the cause of the fire; and it is also true that the fact that he did not show the cause does not show that it was caused in the way the cargo owners claim; and it is also true that if the proof leaves the matter purely one of speculation as to the origin of the fire, the Fire Statute (46 U. S. C. A., Sec. 182) prevents a recovery by the cargo owners" (p. 170).

The Circuit Court of Appeals for the Fourth Circuit affirmed (45 F. [2d] 174) the District Court decision without in any way questioning the quoted holding, a year and a half after it had rendered its decision in *Bank Line v. Porter*, 25 F. (2d) 843, which petitioners claim is in conflict with the decision below by the Second Circuit Court of Appeals (petition, p. 16). If the Circuit Court of Appeals had held in *Bank Line v. Porter*, supra, that the burden of showing freedom from neglect or design was upon the shipowner, would it have affirmed the District Court decision in *Charbonnier v. United States*, supra, which contained a flat holding to the contrary without express disapproval of that holding? Far from so doing the Circuit Court of Appeals said: "The exhaustive and painstaking opinion of the District Judge in these cases *** correctly sets out the issue ***" (45 F. [2d] 174, 175).

Bank Line v. Porter, supra, held that the fire was caused by the neglect of the owner to take proper precautions to unload or ventilate the combustible cargo of jute during the long delay at tropical ports caused by breakdowns of the vessel; it did not discuss or determine the issue of burden of proof. The neglect which defeated the owner's

right to exoneration under the Fire Statute in that case was not neglect to advise the surveyor of the vessel's breakdowns on her voyage out to India; it was neglect to care for the cargo during the breakdowns on the voyage home. The owner's failure to give the surveyor the facts of prior breakdowns of her machinery was held by the Court to render his certificate of seaworthiness unreliable and of no probative value; it was not held to be "neglect" within the Fire Statute.

As early as 1873 in *Keene v. The Whistler*, 14 Fed. Cas. 208, Fed. Cas. No. 7,645, the District Court for the District of California held:

"The damage in this case having been caused by fire 'happening on board' the above vessel, the burden of proof is on the libellant to show that such fire was caused by the design or neglect of the owner or owners of the vessel" (p. 208).

No reported decision under the Fire Statute has ever held to the contrary.

Petitioners have misquoted (petition, p. 15) a portion of this Court's opinion in *Walker v. Transportation Co.*, 3 Wall. 150, 153. The exact words employed by Mr. Justice Miller are as follows:

"The language of the 1st section is, that no owner or owners of any ship or vessel shall be liable to answer for any loss or damage which may happen by reason or means of fire on board such ship or vessel 'unless such fire is caused by the design or neglect of such owner or owners.' The owners are here released from liability for loss by fire, in all cases not coming within the exception. The exception is of cases where the fire can be charged to the owners' design, or the owners' neglect" (p. 153).

This is not saying that owners must prove an absence of design or neglect, but rather that they are released from liability unless the fire is shown to have been "charged to" their design or neglect. The decision below is in full accord with that principle.

This Court in making the statement quoted by petitioners (petition, p. 15) from *Providence etc. Co. v. Hill Manufacturing Co.*, 109 U. S. 578, was not considering the question of burden of proof but rather supporting its premise that damage by fire might come within the third section of the Act of 1851 as well as the first, i.e., that even if the owner was not entitled to exoneration under the first section, he might limit his liability to the value of the vessel and her freights under the third. The Court said:

"The conditions of proof, in order to avoid a total or a partial liability under the respective sections, are very different" (p. 602).

In *Craig v. The Continental Insurance Co., etc.*, 141 U. S. 638, this Court said:

• * * * it was held by this court, in *Walker v. Western Transportation Co.*, 70 U. S., 3 Wall. 150, in regard to the statute (Act of March 3, 1851; § 1, 9 Stat. at L. 635, now § 4282 of the Revised Statutes) * * * that, in order to make the owner of a vessel, *in case of loss by fire, liable for negligence, it must appear that the owner had directly participated in the negligence*" (p. 646).

Hines v. Butler, 278 F. 877, cited by petitioners (brief, p. 33) in support of their contention that Circuits other than the Second have placed the burden of proving freedom from negligence on the owner, does not even mention the burden of proof. If any inference may be drawn from the language used, it is that the burden is on the cargo claimants. The Court said:

"Upon the hearing below, the learned District Judge held that *the evidence showed such neglect on the part of the owner of the vessel that he was not entitled to freedom from liability as provided in section 4282* * * *. In other words, it was held by the District Court that the Director General of Railroads was not entitled to exemption from all liability under section 4282, because the *testimony established that the fire was caused by the neglect of the owner*" (p. 879).

The District Court's opinion in that cause, reported in 264 F. 986, does not, as petitioners claim, make it "fairly apparent" that it considered the burden of proof to rest upon the shipowner under the Fire Statute and the opinion was not so interpreted by the Circuit Court of Appeals.

It is noteworthy that one of the District Courts in the Ninth Circuit in *The President Wilson* (N. D. Calif., S. D.), 5 Fed. Supp. 684, expressly followed the principle which the Fourth and Second Circuits had previously recognized, saying:

" * * * to remove the vessel from the exemption of the 'fire statute' it was incumbent upon the libelant to show that the fire was caused by the design or neglect of the shipowner. This burden has not been discharged by the libelant. *The Salvore*, (C. C. A.) 60 F. (2d) 683; *Charbonnier v. U. S.*, (D. C.) 45 F. (2d) 166, affirmed (C. C. A.) 45 F. (2d) 174" (p. 686).

The Court which rendered the decision in *The President Wilson*, *supra*, would certainly have followed its own Circuit Court of Appeals had it ever ruled otherwise than the Second and Fourth Circuits. It was the Ninth Circuit Court of Appeals which decided *Williams S.S. Co. v. Wilbur*, 9 F. (2d) 622, on which petitioners place great reliance throughout their brief.

The English Fire Statute as quoted by petitioners (footnote, petition, p. 16) expressly limits the loss or damage by fire from the consequence of which the shipowner is exonerated to that "happening *without his actual fault or privity*", language which is similar to that used in the American Limitation Statute and not to that used in the American Fire Statute, *supra*, p. 8. The English Fire Statute makes absence of fault or privity a condition precedent to the immunity; the American Fire Statute grants the immunity subject to a single exception. The distinction is obvious. The English cases cited by petitioners (brief, pp. 34, 36), *Lennard's Carrying Co., Ltd. v. Asiatic Petroleum Co., Ltd.* (1915), A. C. 705, affirming (1914) 1 K. B.

419, 432; *Ingram & Royle v. Services Maritimes du Transport* (1914), 1 K. B. 541, 559; *Royal Exchange Assurance v. Kingsley Navig. Co.* (1923), A. C. 235; *Standard Oil Co. v. Clan Line Steamers* (1924), A. C. 100, are clearly distinguishable since they deal with statutes³ whose language is materially different from that of the American Fire Statute.

The Circuit Court of Appeals for the Second Circuit has never denied that the carrier must bring itself within the exemption from liability granted by the Fire Statute by showing that the loss was due to fire. It has merely held that once the carrier brings itself within that exemption, the burden is on the cargo to prove that the fire was, in turn, caused by the design or neglect of the owner. The court below cited the decision of the United States District Court for the Eastern District of New York in *The Strathdon*, S. F. 374, wherein Judge Thomas had said:

"From ordinary rules, it is inferred easily that, after the loss has been shown to have arisen from

³ British Fire Statute—*Merchant Shipping Act*, Sec. 502:

"The owner of a British sea-going ship, or any share therein, shall not be liable to make good to any extent whatever any loss or damage happening without his actual fault or privity in the following cases; namely,

(1) where any goods, merchandise, or other things whatsoever taken in or put on board his ship are lost or damaged by reason of fire on board the ship; * * *

Canadian Water Carriage of Goods Act, 1910, Sec. 7:

"The ship, the owner, charterer, agent or master shall not be held liable for loss arising from fire, . . . of the sea or other navigable waters, acts of God or . . . enemies, or inherent defect, quality or vice of the . . . arfied, or from insufficiency of package, or seizure under legal process, or for loss resulting from any act or omission of the shipper or owner of the goods, his agent or representative, or from saving or attempting to save life or property at sea, or from any deviation in rendering such service, or other reasonable deviation, or from strikes, or for loss arising without their actual fault or privity or without the fault or neglect of their agents, servants, or employees" (1910, c. 61; s. 7).

fire, the burden is on those asserting that the fire was caused by the ship owner's design or neglect to prove it, and indeed, the authorities are to that effect. *Keepe v. The Whistler*, 2 Sawy. 348, 14 Fed. Cas. 208; *The Victory*, 168 U. S. 410, 423, 18 Sup. Ct. 140; *Claflin v. Meyer*, 75 N. Y. 260" (p. 378).

In *The Older*, 65 F. (2d) 359, 360, the Circuit Court of Appeals for the Second Circuit said:

" * * * the case comes down to whether the libelant has proved that the fire was caused by his 'design or neglect'; the burden in such cases being on the injured party. *The Salvore*, 60 F. (2d) 683; *The Strathdon* (D. C.), 89 F. 374, 378. The situation is like any other where the claimant brings himself within an exemption, in which event the libelant must prove that he has been negligent."

This holding of the Circuit Court of Appeals for the Second Circuit is entirely in accord with the decisions of this Court. In *The Victory*, 168 U. S. 410, 423, the Court said:

" 'Collision' was an exception in all the bills of lading, and * * * as the damage was occasioned by collision and within the exception, it rested upon the underwriters, in this case to defeat the operation of the exception by proof of such negligence on the part of the Plymothian as would justify a decree against her if sued alone."

Petitioners have cited numerous cases in this Court (brief, p. 35), which, it is claimed, the Circuit Court of Appeals for the Second Circuit has violated in principle. The leading case so cited is *Clark v. Barnwell*, 12 How. 272, which, however, fails to support petitioners' contention as the following quotation clearly shows:

"After the damage to the goods * * * has been established, the burden lies upon the respondents [carrier] to show that it was occasioned by one of the perils from which they were exempted by the bill of lading.

and, even where evidence has been thus given bringing the particular loss or damage within one of the dangers or accidents of the navigation, it is still competent for the shippers to show that it might have been avoided by the exercise of reasonable skill and attention on the part of the persons employed in the conveyance of the goods: for, then, it is not deemed to be, in the sense of the law, such a loss as will exempt the carrier from liability, but rather a loss occasioned by his negligence, and inattention to his duty. Hence it is, that, although the loss occurs by a peril of the sea, yet if it might have been avoided by skill and diligence at the time, the carrier is liable. *But in this stage and posture of the case, the burden is upon the plaintiff to establish the negligence, as the affirmative lies upon him*" (p. 280).

We shall not quote passages from each of the other cases cited by petitioners, namely, *Lawrence v. Minturn*, 58 U. S. 100; *The Mohler*, 88 U. S. 230; *The Edwin J. Morrison*, 153 U. S. 199; *The Malcolm Baxter, Jr.*, 277 U. S. 323, and *The Vallescura*, 293 U. S. 296, but confidently submit that each upon analysis will be found to be in full accord with *Clark v. Barnwell* (*supra*), *The Strathdon*, 89 F. 374, *The Salvore*, 60 F. (2d) 683, *The Older*, 65 F. (2d) 359, and the decision below in the cause at bar. In all these cited cases the exemption was contractual, i.e., the bills of lading provided for exemption from liability in the case of loss from enumerated perils. The Court, however, refused to recognize the exemptions as absolute and permitted recovery when negligence of the carrier was proved by the cargo claimants. The sole difference between the contractual exemptions from liability of ship-owners in bills of lading and the immunity given such owners by the Fire Statute is that negligence impliedly deprives such owner of immunity in the former while it expressly deprives it of immunity in the latter.

The Circuit Court of Appeals for the Second Circuit was clearly right when it held 'below':

"Since the claimants have the burden of proving 'neglect' under this statute—unlike the Limited Liab-

bility Statute—they must in any event fail upon this issue, for by no stretch can it be said that they proved that the fire was 'caused' by Fegen's ignorance of the charterer's past experience. *The Strathdon*, 89 Fed. Rep. 374, 378; *The Salvore*, 60 F. (2d) 683 (C. C. A. 2); *The Older*, 65 F. (2d) 359 (C. C. A. 2)" (R. 2046).

POINT II

(Answering Proposition B)

The Fire Statute provides total immunity to the ship-owner for losses to cargo by fire unless caused by its design or neglect; it is not limited to liability *in personam*.

The petitioners by emphasizing the words "*no owner*" in the Fire Statute argue that the immunity given is restricted to such owner's *in personam* liability and does not extend to his vessel upon which fire occurs in the cargo (brief, p. 40) and cite *The Etna Maru*, 33 F. (2d) 232, as authority, in which the Circuit Court of Appeals for the Fifth Circuit reached this conclusion although neither appellant nor appellee in brief or argument made any such contention or even suggested it. Counsel in the cause at bar on both sides were counsel in *The Etna Maru*, supra. The strange hypothesis that an owner can be exonerated from liability while his property still remains liable originated entirely in the Circuit Court of Appeals for the Fifth Circuit in that cause and is contrary to both law and reason. This Court in *Earle & Stoddart v. Wilson Line*, 287 U. S. 420, 428, note 3, disapproved of the only doctrine for which *The Etna Maru*, supra, was cited by counsel for petitioners in that cause. The point for which *The Etna Maru*, supra, is now cited by petitioners was not then before this Court and consequently was not passed upon by it. However, it would seem that this Court by the use of the words "But compare *The Rapid Transit*, (D. C.) 52 Fed. 320, 321" in note 3, immediately after stating the ground of the

affirmance, at least indicated doubt of the doctrine since *The Rapid Transit*, supra, is diametrically opposite to such doctrine as is also *Keene v. The Whistler*, 14 Fed. Cas. 208.

The Circuit Court of Appeals below disposed of the holding of *The Etna Maru* succinctly as follows:

"So far as that decision retains any authority after *Earle & Stoddart v. Wilson Line*, 287 U. S. 420, we cannot agree: § 182 gives complete exoneration of liability; § 183 only a limitation of liability. To say that an owner is completely exonerated, although one may arrest his ship and sell it, is a contradiction in terms, unless we are to think of the ship as a jural person capable of wrongdoing" (R. 2043).

The Fire Statute contemplates complete freedom from liability except when the expressed conditions are shown to exist. *Earle & Stoddart v. Wilson Line*, 287 U. S. 420, 425. Obviously a vessel owner is not completely freed from liability for loss or damage by fire if his vessel may be held therefor, since the money to pay for such damage must come from his funds. The terms of the statute are that "No owner of any vessel shall be liable to answer for or make good to any person any loss or damage, which may happen to any merchandise whatsoever, * * *." They contemplate full and complete immunity not only of the owner's bank account but also of his vessel unless his design or neglect caused the fire.

This Court has construed the phrase "owner of any vessel", in the Limitation of Liability Statute to apply to actions *in rem* as well as *in personam*, observing in *The City of Norwich*, 118 U. S. 468, 503:

"To say that an owner is not liable, but that his vessel is liable, seems to us like talking in riddles."

And see:

Hartford Accident Co. v. Southern Pacific, 273 U. S. 207, 216.

This Court has frequently held that the Fire Statute is remedial and should be construed liberally.

Walker v. Transportation Co., 3 Wall. 150;

Norwich Co. v. Wright, 13 Wall. 104, 120-21.

In *The Queen of the Pacific*, 180 U. S. 49, 52-3, this Court held that a clause providing that neither the steamship company nor its stockholders should be liable unless notice of claim was presented within a specified time protected the vessel as well, saying:

"In either event the money to pay for such damage must come from the treasury of the company; and we ought not to give such an effect to the stipulation as to enable the owner of the merchandise to avoid its operation by simply changing his form of action."

If this be true of a contractual stipulation in the carrier's own bill of lading, all the more should it be true of a broad remedial statute reflecting public policy.

The construction of the Fire Statute advanced in *The Etna Maru*, supra, would nullify the statute except in case of the vessel's total loss because the cargo owner could always avoid the immunity given by the statute by bringing his action *in rem*. This construction would in effect change the statute in actions *in rem* from one of exoneration to one of mere limitation of liability to the value of the vessel thus making it substantially equivalent to the third section of the Act of March 3, 1851 (Limitation of Liability). But this would be inconsistent with the holding of this Court in *Providence & N. Y. S. S. Co. v. Hill*, 109 U. S. 578, in which the liability under the two statutes is contrasted. It would add a new exception to the "complete immunity granted" by the Fire Statute contrary to this Court's holding in *Earle & Stoddart v. Wilson Line*, 287 U. S. 420, 425.

The President Wilson (N. D. Calif., S. D.), 5 F. Supp. 684, 685, was a proceeding *in rem* to recover for the loss of a cargo of sugar totally destroyed by fire. The Court

expressly disapproved of the doctrine of *The Etna Maru*, supra, that the Fire Statute is limited to personal exemption, and said:

"Undoubtedly, the weight of authority clearly holds that, in actions in rem for the recovery of damage caused by fire, the 'fire statute' grants immunity of liability to the vessel, as well as personal exemption; vide *The Rapid Transit* (D. C.), 52 F. 320; *Keene v. The Whistler*, Fed. Cas. No. 7,645; *Dill v. The Bertram*, Fed. Cas. No. 3,910."

The Buckeye State (W. D. N. Y.), 39 Fed. Supp. 344, 346, contains the following statement:

"The further claim is made by the libellant that where there is fire damage the Fire Statute, supra, leaves the owner liable for the value of the vessel, and it cites the *Etna Maru*, 5 Cir., 33 F. 2d 232, 233, certiorari denied 280 U. S. 603, 50 S. Ct. 85, 74 L. Ed. 648. No implication is to be drawn from the denial of certiorari that the Supreme Court indicates any expression upon the merits. *Atlantic Coast Line R. Co. v. Powe*, 283 U. S. 401, 51 S. Ct. 498, 75 L. Ed. 1142. The decision in *Etna Maru*, supra, seems to be against the weight of the authorities and not in accord with the plain meaning of the statute. *The Rapid Transit*, D. C., 52 F. 320; *The President Wilson*, D. C., 5 F. Supp. 684; *Keene v. The Whistler*, Fed. Cas. No. 7645; *Dill v. The Bertram*, Fed. Cas. No. 3910. In a footnote in *Earle & Stoddart v. Wilson Line*, supra, reference is found to *Etna Maru*, supra, and *The Rapid Transit*, supra. The indication there seems to be that the *Etna Maru* decision was disapproved."

And see:

The Munaires (E. D. La.), 12 F. Supp. 913, 918.

Possibly the best criterion of *The Etna Maru*, supra, is that it has never been followed by any other case and has never been mentioned except with disapproval. Its only distinction is that it has so thoroughly met the dis-

approval of this Court as to be made the main subject of a note in *Earle & Stoddart v. Wilson Line*, 287 U. S. 420, 428.

POINT III

(Answering Proposition C)

It has never been held by this Court or by the Circuit Court of Appeals of any Circuit that the acceptance of cargo for transportation which is likely to heat, constitutes personal "design or neglect" of the shipowner if the method of stowage thereof is still "in flux".

Petitioners pose questions numbered I and IV (petition, pp. 7, 17) and claim that English courts and the Circuit Court of Appeals in other Circuits than the Second have held that such acceptance of cargo deprives the shipowner of the benefits of the Fire Statute, and *ergo* that a mere showing of such acceptance sustains cargo's burden of proof thereunder (petition, pp. 7-12, 18). This claim is not sustained by the authorities cited.

In *Williams S. S. Co. v. Wilbur*, 9 F. (2d) 622, the personal "neglect" found was the "improper stowage and inadequate ventilation" of the cargo which was "known to and acquiesced in by the general agent of the owner at Baltimore, who had supervision of the loading of cargo for the appellant for a period of three years" (pp. 622-23). Negligence was not predicated on the acceptance of the cargo, but on the method of stowage which had been "adopted and followed" (p. 623) by the carrier and acquiesced in by its general agent.

Bank Line v. Porter, 25 F. (2d) 843, relied on by petitioners as illustrating the Fourth Circuit's alleged conflict with the Second Circuit on this point, involves an entirely different set of facts from those at bar. The personal negligence held to deprive the owner of the immunity

afforded by the Fire Statute lay in its permitting the vessel to leave port with unseaworthy engines and boilers and in its failure to take precautions by unloading or ventilating the combustible cargo when it knew that the vessel was delayed for repairs for a 74-day period in the tropics. The Court specifically found that "A condition involving danger of fire, and known to the owner of the vessel, was permitted to exist through the owner's negligence . . ." (p. 845).

The Nichiyo Maru, 89 F. (2d) 539 (C. C. A. 4), did not involve the Fire Statute, and therefore no issue as to the personal design or neglect of the owner was presented to the Court. In that cause the Court found a breach of duty by the carrier in stowing "so large a quantity of this commodity closely packed in the holds of the vessels, with no more ventilation than the evidence shows to have been provided . . ." (p. 542). The Court did not hold that the acceptance of the cargo on a general ship; when there was no established custom of stowage, was a breach of duty, and, as pointed out above, the issue of personal negligence on the part of the owner was not even before the Court.

None of the above causes in any way resembled the cause at bar. Negligence, its existence or absence, must be determined on specific facts; whether, when negligence has been found, it should be attributed personally to the owner depends entirely on proof of such owner's participation in the acts or omissions which constitute such negligence.

In the cause at bar respondent-charterer accepted for carriage to U. S. Atlantic ports a common and usual article of commerce and knowing that it was a cargo which might heat, in direct proportion to its moisture and oil content, employed an experienced independent surveyor, Captain Fegen, to supervise the stowage, in no way restricting his selection of the method to be employed. Petitioners illogically contend that there was negligence of the char-

terer-respondent because, they argue, it was "naturally to be expected" that Captain Fegen would employ a method of stowage and ventilation similar to that which it had formerly used (petition, p. 8). On the contrary, it is much more probable that Captain Fegen, as an expert cargo surveyor, given complete freedom of choice, would "naturally" stow the cargo in accordance with the safest method which he knew.

Petitioners' labored attempt (petition, p. 9; brief, p. 28) to parallel the facts of the cause below with those proved in *Williams S. S. Co. v. Wilbur*, 9 F. (2d) 622, and thereby artificially to create a conflict of law between the Ninth and Second Circuits, is frustrated by their own admission that the negligence found in the cited cause lay in a subordinate's following "an improper method of stowage previously adopted" by the shipowner (petition, p. 9). The personal negligence of the owner in such cause lay in his knowledge, through his general agent at Baltimore, that such improper method was in customary use and was being employed in the stowage of the cargo. In the cause at bar the duty of planning and supervising the stowage had been delegated to Captain Fegen, an experienced Lloyd's agent marine surveyor. He was not a general agent for respondents (R. 1975, 2044) and his independent employment belies petitioners' contention that, as in *Williams S. S. Co. v. Wilbur*, supra, the owner had "adopted" a method of stowage which would "naturally" be followed.

Petitioners claim that *Hines v. Butler*, 278 F. 877, is in accord with *Bank Line v. Porter*, 25 F. (2d) 843, and that both are in conflict with the decision herein (petition, pp. 10-11). But those causes are not similar to that at bar. It is patent that neither an owner's knowledge that nothing was being done by way of ventilation or unloading to protect a cargo of combustible jute on board his vessel, during a delay for 74 days in a hot climate while her engines were undergoing repairs as in *Bank Line v. Porter*, supra, nor its failure over a long period of time to supply

fire-fighting equipment to its vessel that was in its home port daily and to ascertain that its crew had been trained to protect passengers and cargo in the emergency of fire as in *Hines v. Butler*, supra, is in any respect comparable to accepting a cargo of fish meal with the knowledge that it is susceptible to heating. The dissimilarity is so apparent that it cannot be logically argued that exoneration of the charterer-respondent by the Circuit Court of Appeals for the Second Circuit below demonstrates a rejection by it of the principles of law adhered to in the Fourth Circuit.

Similarly in *Lennard's Carrying Co., Ltd. v. Asiatic Petroleum Co., Ltd.* (1915), A. C. 765, the acceptance of the cargo of benzine, although attendant with special perils, was not held to be "fault or privity" of the owners, but rather the owners were refused exoneration because of the failure of the managing owner to advise the master of defects in the ship's boilers and to give him special instructions concerning the handling thereof. Petitioners contend that the Circuit Court of Appeals below in order to harmonize its decision with *Lennard's Carrying Co., Ltd. v. Asiatic Pet. Co., Ltd.*, supra, should have found personal negligence on the part of the charterer-respondent in the acceptance of fish meal for carriage with the knowledge that it might heat. But this is not so. The two decisions are in complete harmony. There is a clear distinction between failure to advise a master of a structural defect peculiar to the vessel he is to handle and the acceptance of a well known and common article of commerce, even though it be susceptible to heating.

The history of fish meal carriage (supra, pp. 5-6), and the fact that it had not yet certainly appeared at the time of shipment that properly made fish meal could not be adequately protected by the use of rice ventilators (R. 2045), removes all basis for petitioners' contention that charterer-respondent was negligent in accepting this shipment. Such acceptance was not a "fundamental breach of duty" (brief, p. 24), as petitioners contend, because charterer-respond-

ent, in addition to having a long experience in carrying fish meal successfully, took the precaution of employing an independent cargo surveyor and delegating to him, as an expert, the duty of supervising the stowage of fish meal on its vessels, in order to eliminate the chance of any unsuccessful carriage.

Petitioners distort the meaning of the Circuit Court of Appeals' opinion (R. 2045) when they argue that the Court held negligence is not proved unless the acts of omission or commission are certain to result in damage (brief, p. 38). Such was not the Court's ruling. The portion of its opinion cited by petitioners (brief, p. 38) deals with petitioners' contention below that respondent-charterer accepted the fish meal without knowing how to carry it safely. The Court found that charterer-respondent had been successful in carrying large quantities of fish meal on many voyages and therefore did not accept the petitioners' shipment with a consciousness that there was no successful method of carriage. Rice ventilators had been previously used successfully as an auxiliary to the permanent ventilating system and " * * * it had not yet certainly appeared that, given properly made meal, such ventilation was inadequate * * *" (R. 2045). This statement of the Court, properly confined to the issue under discussion, has no relation to cases cited such as *Cornec v. Baltimore & Ohio R. R. Co.*, 48 F. (2d) 497; *Texas & Pac. Ry. Co. v. Carlin*, 111 F. 777; *The Santa Rita*, 176 F. 890, and *Johnson v. Kosmos Portland Cement Co.*, 64 F. (2d) 193. The Circuit Court of Appeals did not hold that the method of stowing the fish meal on board the *Venice Maru* was not negligent, even though similar stowage had previously resulted in its carriage without damage, but rather that respondent-charterer was not cognizant of a lack of knowledge on how to carry fish meal without heating, because there was no certainty that rice ventilators were not adequate. At the time of the shipment the use of rice ventilators in fish meal stowage was approved

as the best known method by cargo-claimants' underwriter's surveyors (R. 200-1, 204, 208, 216, 219-21, 224, 1094, 1096, 1106). The use of the block and channel method was not adopted until the following year—1935 (R. 1984).

Petitioners' argument, if accepted, would prevent any carriage of heating cargo until an absolutely safe method of stowage was designated. It would prevent any experimentation whatsoever although a safe method could only be found by experimentation. It would make the carrier an insurer of the outcome of all heating cargoes, in spite of the immunity given by the Fire Statute, although the cargo-owner who shipped the heating cargo knew of its propensities as well as, if not better than, the shipowner. Such an argument is clearly unsound.

The decision below is in full accord with this Court's decision in *Earle & Stoddart v. Wilson Line*, 287 U. S. 420.

POINT IV

(Answering Proposition D)

The holding of the Circuit Court of Appeals for the Second Circuit that the delegation by a vessel owner to an expert of the duty of laying out and supervising the stowage of cargo, which it knows to be susceptible to heating, without informing him of previous instances of heating that had occurred in its experience, did not constitute "neglect" within the meaning of the Fire Statute, is not in conflict with decisions of the Circuit Court of Appeals in other Circuits or of this Court.

Petitioners cite several cases which are said to establish the principle that a vessel owner is deprived of the benefits of the Fire Statute unless, in delegating the duty of stowing hazardous cargo to an expert, it informs him of previous instances of heating in its experience (petition, question II, p. 12; brief, Point II, p. 29). None of the cited cases establishes the principle for which it is cited.

The Circuit Court of Appeals for the Fourth Circuit in *Bank Line v. Porter*, 25 F. (2d) 843, as we have pointed out, supra, p. 11, did not hold that the owner of a vessel was deprived of the immunity granted by the Fire Statute because of his failure to furnish information of previous breakdowns of her engines and boilers to Lloyd's surveyor; such failure was merely held to affect the weight to be accorded the surveyor's certificate of seaworthiness. Moreover, it is to be noted, that the information there withheld was of peculiar facts concerning the particular vessel which the surveyor could not have known except through the shipowner's disclosure.

In *The Schwah* (1909), A. C. 450; *Lennard's Carrying Co. v. Asiatic Pet. Co.* (1915, A. C. 705, and *The Clan Gordon* (1924), A. C. 100, the negligence found was the failure to disclose information concerning the peculiar apparatus, structure or stability of the particular vessel. These were facts which either had to be told to those in command of the vessel, or to be learned by sad experience. In *Tempus Shipping Co. v. Louis Dreyfus* (1930), 1 K. B. 596; 712, the Court refused to apply the doctrine of the cited cases to the failure of owners to give instructions concerning matters "which they might well feel * * * could be left to the practical sense and experience of the master." It distinguished *The Clan Gordon*, supra, saying: "In that case it was held that the matter in question involved a question of scientific calculation which might well be beyond the scope of a ship's master." On the contrary, in the cause at bar, Captain Fegen, who was an expert surveyor of heating cargoes including sardine meal, knew the characteristics of sardine meal which was a common article of commerce, and knew that it required ventilation to prevent heating. It was not unreasonable for the respondent-charterer to expect such an expert on sardine meal to possess full knowledge of its characteristics under stowage in ships.

As to the duty to tell Captain Fegen that despite the use of rice ventilators, previous shipments had heated, the court below said:

... it does not appear that Fegen did not inform himself; or that, if he did not, his ignorance made any difference: i.e., that his knowledge of the charterer's past experience would have led him to discard 'rice ventilators' " (R. 2046).

Rice ventilators are employed as auxiliaries to permanent ventilation systems. Even if, as the District Court found, they did not afford sufficient supplementary ventilation (R. 1985), by no means was their use the *cause* of the fire. Their use was not dangerous, but at most inadequate.

Captain Fegen "had been a marine surveyor for 23 years, all the time in Kobe acting as Lloyd's agent; he had surveyed all sorts of cargoes including sardine meal; before becoming a surveyor he had had twenty years sea experience from seaman to captain; and he held a master's license both on British and Japanese ships" (R. 2043). "There is not the least evidence that anyone better qualified was available at Kobe, or, indeed, anywhere else in Japan" (R. 2046). In the light of these findings it cannot be successfully urged that charterer-respondent was negligent in not telling Captain Fegen that fish meal required ventilation or that on five out of 112 previous voyages of its ships it had heated even though rice ventilators had been used in the fish meal stowage on two of such voyages. As an expert he is presumed to have known these facts.

FINAL POINT

The petition for writ of certiorari should be denied.

Respectfully submitted,

GEORGE C. SPRAGUE,
Counsel for Respondents.

New York, N. Y., April 24, 1943.

IN THE

Supreme Court of the United States

OCTOBER TERM 1942

No. 881

In the Matter
of the

Petition of KABUSHIKI KAISHA KAWASAKI ZOSENJO, Owner,
and KAWASAKI KISEN KABUSHIKI KAISHA, Bareboat Char-
terer of the Steamship "VENICE MARU", for Exoneration
from and Limitation of Liability.

CONSUMERS IMPORT CO., INC., et al.,
Cargo Claimants-Petitioners,

KABUSHIKI KAISHA KAWASAKI ZOSENJO and
KAWASAKI KISEN KABUSHIKI KAISHA,
Respondents.

**RESPONDENTS' BRIEF IN OPPOSITION TO
PETITIONERS' MOTION TO ENLARGE THE
SCOPE OF THE ARGUMENT**

GEORGE C. SPRAGUE,
Counsel for Respondents.

IN THE
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Respondents.

**RESPONDENTS' BRIEF IN OPPOSITION TO
PETITIONERS' MOTION TO ENLARGE THE
SCOPE OF THE ARGUMENT**

The original petition herein posed five questions as reasons for granting the writ of certiorari.¹ The Court, in granting the petition, limited it to the fifth question, from which it may fairly be inferred that it was denied as to the first, second, third and fourth questions.

Petitioners' present motion, while guised as one "to enlarge the scope of the argument", is, in reality, a motion for reargument of the original petition in respects in which

it has already been denied. Moreover, although ostensibly requesting an enlargement of the scope of the argument to include *only the fourth question* presented by the petition, the motion paper, *in effect, also includes the first, second and third questions*, inasmuch as the first question is similar to the fourth, while the subjects of the second and third questions, i. e., delegation of the duty of stowing the fish-meal to a surveyor, without informing him of the five cases of heating which the carrier had experienced and burden of proof under the fire statute, are discussed (pp. 2, 3). The Rules appear not to provide for any such reargument, and no reason has been shown why it should be allowed herein.

The arguments now advanced in support of the present motion are the same as those which were previously made in the petition and supporting brief and which were fully answered in Points III and IV of respondents' brief in opposition (pp. 21-28), where the two decisions relied upon by petitioners (*Williams S.S. Co. v. Wilbur*, 9 F. (2d) 662, 623, and *Bank Line v. Porter*, 25 F. (2d) 843, 845) were considered and distinguished. The language quoted from the *Bank Line* case, supra, at page 5 of the motion paper, is not "peculiarly pertinent", as is claimed in the motion paper; it merely holds that a surveyor's certificate of seaworthiness of a vessel's engines at Calcutta is *not proof of such seaworthiness* where the shipowner had failed to inform him of engine breakdowns on the voyage out to Calcutta of which he could have had no knowledge otherwise. The shipowner was there held liable for permitting the vessel to leave port with unseaworthy engines which were likely to, and did, break down and for failing to take precautions to unload or ventilate the combustible cargo during the delay of 74 days in the tropics occasioned by such breakdown. In the words of the court, "A condition involving danger of fire and known to the owner of the vessel was permitted to exist through the owner's negligence * * *" (p. 845). This is not comparable with the

situation at bar, for no condition involving danger of fire existed or was permitted to continue with the owner's knowledge on the *Venice Maru*.

There is no possible conflict between the decisions in the Fourth and Ninth Circuits and that of the Second Circuit in the cause below in respect to the fourth question. The motion to enlarge the scope of the argument should be denied.

Respectfully submitted,

GEORGE C. SPRAGUE,
Counsel for Respondents.

Dated: New York, May 28, 1943.

OCT 15 1943

IN THE

Supreme Court of the United States

OCTOBER TERM 1943

No. 32

In the Matter

of the

Petition of KABUSHIKI KAISHA KAWASAKI ZOSENJO, Owner
and KAWASAKI KISEN KABUSHIKI KAISHA, Bareboat Char-
terer of the Steamship "VENICE MARU", for Exoneration
from and Limitation of Liability.

CONSUMERS IMPORT CO., INC. et al.,
Cargo Claimants-Petitioners,
vs.

KABUSHIKI KAISHA KAWASAKI ZOSENJO and KAWASAKI KISEN
KABUSHIKI KAISHA,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT
COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENTS

GEORGE C. SPRAGUE,
Counsel for Respondents.

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IN THE
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OCTOBER TERM 1943
No. 32

In the Matter
of the

Petition of KABUSHIKI KAISHA KAWASAKI ZOSENJO, Owner
and KAWASAKI KISEN KABUSHIKI KAISHA, Bareboat Char-
terer of the Steamship "VENICE MARU", for Exonération
from and Limitation of Liability.

CONSUMERS IMPORT Co., Inc. et al.,
Cargo Claimants-Petitioners.

vs.

KABUSHIKI KAISHA KAWASAKI ZOSENJO and KAWASAKI KISEN
KABUSHIKI KAISHA,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT
COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENTS

Statement

The respondents are owner and bareboat charterer re-
spectively of the steamship *Venice Maru*, a merchant vessel

which sailed from Japan in July, 1934, laden with cargo for New York via Los Angeles and Panama Canal.¹ On this voyage when between Los Angeles and Balboa fire broke out in sardine meal cargo stowed in No. 1 lower hold of the vessel resulting in damage to this and other cargo in holds 1 and 2 and to the vessel. The fire was extinguished at Balboa, whereupon the spoiled cargo was removed, the holds were cleaned, the undamaged cargo was restowed and the vessel then completed her voyage to New York.

At New York the petitioners who were owners of cargo that had been destroyed or damaged by the fire filed libels *in rem* against the vessel and *in personam* against respondent bareboat charterer (operator) for their damages whereupon the respondents as owner and bareboat charterer respectively of the vessel filed the petition herein for exoneration from or limitation of liability pleading the Fire Statute, (46 U. S. C. 182) and filing an *ad interim* stipulation for value herein in the sum of \$245,000. as provided by Admiralty Rule 51 of this Court.² Petitioners having filed claims in the proceeding and answered the petition the cause came to trial on the issues joined. Both Courts below concluded that respondents were entitled to exoneration from liability to petitioners under the Fire Statute (46 U. S. C. 182) although they found that the vessel was unseaworthy with respect to the stowage of the sardine meal in No. 1 hold and that this caused the fire, holding that such unsaworthiness was not neglect or design of respondents since they had delegated the duty of laying out and supervising such stowage to an outside expert, which duty was delegable under said Statute, citing *Earle*

¹ 46 U. S. C. 186, which was Section 5 of the same enactment as the Fire Statute (Appendix A, infra p. 37), provides that a charterer who mans, victuals and navigates a vessel, i.e., a demise or bareboat charterer, is deemed an owner within the meaning of the Fire Statute. Both the general owner and the bareboat charterer may limit their liability in respect to the same vessel as respondents did. *Quinlan v. Pew* (C. C. A. 1st), 56 F. 111; *Monongahela River Consol. Coal & Coke Co. v. Hurst* (C. C. A. 6th), 200 F. 711, 713.

& Stoddart Inc. et al. v. Ellerman's Wilson Line Ltd. (*The Galileo*), 287 U. S. 420. The opinion of the District Court (R. 33-40) is reported in 39 Fed. Supp. 349. The opinion of the Circuit Court of Appeals for the Second Circuit affirming the decree of the District Court (R. 60-69) is reported in 133 F. (2d) 781.

The petitioners applied to this Court for a writ of certiorari posing five questions as reasons for granting the writ. This Court on May 10, 1943 granted the writ but limited it to the fifth question presented by the petition (R. 71) which was:

"Does the Fire Statute extinguish maritime liens for cargo damage or is its operation confined to *in personam* liability only?"

Petitioners moved on May 18 to enlarge the scope of the argument to cover other questions but this motion was denied.

Counsel for respondents, with the approval of the Alien Property Custodian, was retained in January 1942 by Standard Surety and Casualty Co. of New York, the bonding company which gave the *ad interim* stipulation in this proceeding, to continue the cause in the Circuit Court of Appeals and in this Court. The Alien Property Custodian by vesting orders No. 77 and 80, both dated July 30, 1942, vested in himself all property in the United States of respondent Kawasaki Kisen Kabushiki Kaisha; likewise by Vesting Order No. 1084 dated March 15, 1943, he vested in himself all property payable or owing to the Tokyo Marine & Fire Insurance Co., Ltd., a Japanese corporation, which advanced to Standard Surety & Casualty Company of New York cash collateral to secure the above *ad interim* stipulation. In the event of respondents' success in this cause this collateral, subject to general average and other claims, will belong to the Alien Property Custodian.

ARGUMENT

I

The Fire Statute gives the shipowner complete exoneration from liability for damage to cargo by fire on board his vessel: This clearly appears from (a) the plain language of the statute; (b) its legislative history; (c) its interpretation in early decisions of this Court; and (d) the line of decisions in the district courts and circuit courts of appeal covering a period of nearly ninety years which with the single exception of *The Etna Maru*, 33 F. (2d) 232, have held that the statute relieves the owner's ship from liability *in rem* as well as the owner *in personam*.

The words of the Fire Statute are as follows:

"No owner of any vessel shall be liable to answer for or make good to any person any loss or damage, which may happen to any merchandise whatsoever, which shall be shipped, taken in, or put on board any such vessel, by reason or by means of any fire happening to or on board the vessel, unless such fire is caused by the design or neglect of the owner" (46 U. S. C. 182, R. S. 4282).²

² This was the first section of Act March 3, 1851, c. 43, par. 1, 9 Stat. 635, entitled: "An Act to Limit the Liability of Ship-Owners and for other Purposes." This section remains the same as originally enacted except that the following proviso which appeared in the Act of 1851 was deleted by the general repealer section of the Revised Statutes, 1874 (R. S. 5596): "Provided that nothing in this act contained shall prevent the parties from making such contract as they please, extending or limiting the liability of shipowners", while the words "subject or" were at the same time omitted. This deletion and omission in no sense changed the meaning of the section in so far as the question before this Court is concerned. The Act contained six other sections, the second of which related to liability of shipowners for the carriage of precious metals, bullion and bank notes, the true character and value whereof had not been declared by the shipper, the third and fourth relating to limitation

A. The language is plain and should be construed liberally.

The words of the Statute are that no vessel owner "shall be liable to answer for or make good to any person" any loss or damage to cargo by fire on its vessel. These are general words used to express complete exoneration of liability.³ They relieve the owner's vessel from a maritime lien based upon *in rem* liability as fully as they relieve him *in personam*. If such vessel were still subject to such a lien then the owner would have to pay the amount of the loss or damage by fire in order to obtain possession of

of shipowner's liability for loss of or damage to goods by collision, etc., occasioned without said owner's "privity or knowledge", the fifth relating to the liability of a demise charterer, the sixth reserving existing remedies against the master, officers or seamen for embezzlement, etc., of property on board a vessel and the seventh concerning shipment of dangerous cargo, without the shipper's disclosure of its nature and character and finally a general provision declaring the Act to be inapplicable to the owners of canal boats, barges or lighters or of any vessels "used in rivers or inland navigation." Petitioner has printed some, but not all, of the provisions of this Act in Appendix A attached to its brief (pp. 43-46). In order that there may be no misunderstanding, the entire Act is printed in Appendix A hereto (*infra*, pp. 35-38) with notation of any subsequent amendments and reference to the Revised Statutes and U. S. Code sections to which each provision has been carried over.

³ "To answer" means to pay the entire amount due, *American Surety Co. v. North Packing & Provision Co.* (C. C. A. 1st), 178 F. 810, or "to be responsible" (Webster's International Dictionary, Century Dictionary); the addition of the word "for", which is rarely met with, means to answer "absolutely" (Century Dictionary) or "guarantee" (Murray's A New English Dictionary on Historical Principles). "To make good" means "to fulfil an obligation", *State v. Ohlfest*, 139 Kans. 40, 30 P. (2d) 301, 303, *Queenan et al. v. Palmer*, 117 Ill. 619, Webster's International Dictionary; or "to indemnify", 38 C. J. 341, Century Dictionary. The use of the two terms together in this section shows an intention to remove every latent doubt that complete exoneration of the shipowner from all liability was to be understood. As this Court said in *Lincoln v. Ricketts*, 297 U. S. 373, 376: "In construing the words of an act of Congress, we seek the legislative intent. We give to the words their natural significance unless that leads to an unreasonable result plainly at variance with the evident purpose of the legislation." And see, *De Ganay v. Lederer*, 250 U. S. 376; *Green v. Biddle*, 8 Wheat. 1; *United States v. Temple*, 105 U. S. 97.

her from the process of the Court. This would constitute answering for or making good the loss or damage from which he was relieved by the statute itself. The owner would "answer for" and "make good" the loss as completely by paying for the removal of a maritime lien on his vessel therefor as by paying the same amount to satisfy a decree *in personam* against himself. As the Circuit Court of Appeals below concisely put it:

"To say that an owner is completely exonerated, although one may arrest his ship and sell it, is a contradiction in terms, unless we are to think of the ship as a jural person capable of wrongdoing. That notion has indeed had its place in the law of the sea, but it is a bit of mythology, a fiction not to be applied to defeat a statute designed to protect and foster maritime enterprise" (R. 63).

This Court construed the term "owner of any vessel" in the limitation of liability sections (three and four) of the same Act of March 3, 1851, of which the Fire Statute, containing the same term, was section one, to apply to actions *in rem* as well as *in personam* in *The City of Norwich*, 118 U. S. 468, with the following observation:

"To say that an owner is not liable, but that his vessel is liable, seems to us like talking in riddles. A man's liability for a demand against him is measured by the amount of property that may be taken from him to satisfy that demand. In the matter of liability, a man and his property cannot be separated." * * * (p. 503).

In the *Queen of the Pacific*, 180 U. S. 49, this Court held that a bill of lading clause, providing that neither the steamship company nor its stockholders should be liable unless notice of claim was presented within a specified time, protected the vessel as well as the carrier, saying:

"In either event, the money to pay for such damage must come from the treasury of the company; and we

ought not to give such an effect to the stipulation as would enable the owner of the merchandise to avoid its operation by simply changing his form of action" (pp. 52-3).

And see to the same effect *The Kensington* (C. C. A. 2d), 94 F. 885, reversed on other grounds 183 U. S. 263, where the Court said concerning such a clause:

"The proposition contended for, that the clause in question provides only for the relief of the 'shipowner or agent' and does not inure to the benefit of the ship itself, which in this suit is called upon to respond only because as is alleged, the owner did not fully carry out its contract, seems to be without merit." (p. 888).

If the word "shipowner" or its equivalent in a contractual bill of lading provision covers the ship's liability *in rem* as this Court has thus held, a statutory exemption of the "owner of any vessel" should be given at least similar force and effect.

In *Norwich Co. v. Wright*, 80 U. S. 104, this Court in discussing the Act of March 3, 1851 said:

"The great object of the law was to encourage shipbuilding and to induce capitalists to invest money in this branch of the industry. Unless they can be induced to do so, the shipping interests of the country must flag and decline. * * * The public interests require the investment of capital in shipbuilding, quite as much as in any of these enterprises" (p. 121).

In *Liverpool Nav. Co. v. Brooklyn Terminal*, 251 U. S. 48, this Court said that the purpose of the Act was "to give our shipowners a chance to compete with those of Europe" (p. 53), while in *American Car & Foundry Co. v. Brassert*, 289 U. S. 261, it said that its purpose was "to encourage investments in ships and their employment in commerce" (p. 263).

In *Walker v. The Transportation Co.*, 3 Wall 150, this Court said:

"It is quite evident that the statute intended to modify the shipowner's common law liability for everything but the Act of God * * *." (p. 153).

As remedial statutes they "should be construed liberally in order to effectuate their beneficent purposes." *Larsen v. Northland Transp. Co.*, 292 U. S. 20, 24.

The construction which the Court in the *Etna Maru*, 33 F. (2d) 232, placed upon the Act is not merely harsh and far from liberal but is contrary to the plain meaning of the words used therein and leads to an unreasonable and absurd result.* This Court has frequently observed that words used in a statute must be interpreted in accordance with their common and accepted meaning and not restricted unless "called for by the sense, or the objects, or the mischiefs of the enactment." *United States v. Coombs*, 12 Pet. 72; *Chamberlain v. Western Trans. Co.*, 44 N. Y. 305. And see other cases cited in footnote 3; supra, p. 5.

B. The legislative history of the Statute shows that the intention was to exonerate completely shipowners from liability for loss of or damage to cargo by fire unless caused by their personal design or neglect.

In *Norwich Co. v. Wright* (1871), 80 U. S. 104, 117, this Court in an opinion by Mr. Justice Bradley discussed the

* It is well established by the decisions of this Court that legislative enactments will be so construed as to avoid unreasonable and absurd results. *Church of the Holy Trinity v. United States*, 143 U. S. 457; *Ozawa v. United States*, 260 U. S. 178, 194; *United States v. American Trucking Associations*, 310 U. S. 534, 542-544; *Helvering v. Hammel*, 311 U. S. 504, 510-511. Even if the language of the Fire Statute were obscure, instead of being remarkably plain as is the case, a construction which limited its beneficent provisions to *in personam* liability would lead to unreasonable and absurd results as is shown by the language of this Court in *The City of Norwich*, 118 U. S. 468, 503, and in *The Queen of the Pacific*, 180 U. S. 49, 52-53, quoted supra, p. 6.

legislative history of the Act of March 3, 1851 and showed that it was patterned upon English legislation.

"By 26 George III (1786) this limitation of liability was extended to robbery and to losses in which the master and mariners had no part *and liability for loss by fire was entirely removed* as well as liability for loss of gold and jewelry unless its nature and value were disclosed" (p. 117).

" * * * In the light of all this previous legislation the Act of Congress was passed in 1851" (p. 119).

" * * * The Act of Congress seems to have been drawn with direct reference to all these previous laws, and with them before us, its language seems to be not difficult of construction" (p. 120).

In *The Main v. Williams*, 152 U. S. 122, this Court, in an opinion by Mr. Justice Brown, again stated that this Act of 1851 was patterned upon English statutes, the first being the Act of 7 George II, c. 15, passed in 1734 and subsequently amended so that "this limitation of liability was extended to losses in which the master and mariners had no part, to losses by their negligence and to damage done by collision, *while there was an entire exemption of liability for loss or damage by fire or for loss of gold and jewelry, unless its nature and value were disclosed*" (p. 127).

"The attention of Congress does not seem to have been called to the necessity for similar legislation until 1848, when the case of the Lexington * * * 6 How. 344 was decided by this Court. In this case the owners of a steamboat, which was burnt on Long Island Sound, were held liable for about \$18,000 in coin which had been shipped upon the steamer and lost. In consequence of the uneasiness produced among shipowners by this decision and for the purpose of putting American shipping upon an equality with that of other maritime nations Congress in 1851 enacted what is commonly known as the Limited Liability Act which has been incorporated into the Revised Statutes sections 4282 to 4290 * * * (p. 128).

And see *Providence & N. Y. S. S. Co. v. Hill Mfg. Co.*, 109 U. S. 578, where this Court in the majority opinion by Mr. Justice Bradley said:

"Fire, except when produced by lightning, not being regarded in the commercial law as the act of God, ship-owners, as common carriers, were held liable for any loss or damage caused thereby. The first section of the Act of 1851 was no doubt intended to change this rule. It was copied (all except the last clause) from the second section of 26 George III ch. 86 passed in 1786. The last clause of the section, excepting from its operation cases in which the fire is caused 'by the design or neglect' of the owners was probably implied in the English statute without being expressed as in ours" (p. 602).

Although the "Act was passed with very scanty scrutiny of its provisions. For a part of a day only it was under desultory discussion of the Senate." (The Limited Liability of Ship-Owners for Master's Faults—Harrington Putnam, Esq., 17 Amer. Law Rev. 1, 14), most of the discussion was with reference to the first section concerning loss of cargo by fire and the purpose of that section was fully stated. Senator Hamlin reported the bill from the Committee on Commerce on January 25, 1851 and it was considered by the Committee of the Whole. Concerning section 1 he said:

"It proposes that no owner of any ship or vessel shall be liable to answer for or make good any loss or damage which may happen to any goods or merchandise whatsoever which shall be put on board any such vessel by means of any fire happening to or on board the vessel unless it is caused by the design of the owners" (23 Cong'l Globe, p. 331).

"This bill is predicated on what is now the English law, and it is deemed advisable by the Committee on Commerce that the American marine should stand at home and abroad as well as the English marine" (Id., p. 332).

On February 26, Senator Hamlin again brought up this bill, saying: "It is a bill which, I think, is just in its pro-

visions, and it places our commercial marine upon the same basis as that of England" (Id., p. 713). He moved to amend section 1 by inserting the words "or neglect" (Id., p. 715). He then said:

"The first section of the bill provides for the protection of the owners of vessels against losses that happen by fire. That is the English law. *The English law is unqualified, and does not hold the owners of a ship or vessel liable for loss by fire in any case.* I have added, however, an amendment to this section, which still holds the owner or owners of a vessel liable for losses by fire which shall be occasioned by his or their neglect" (Id., p. 715).⁵

"It simply holds the owner of the vessel harmless provided the loss did not happen by his fault or neglect" (Id., p. 715).

After reading the entire bill, Senator Hamlin said:

"These are the provisions of the bill. It is true that the changes are most radical from the common law upon the subject; but they are rendered necessary, first from the fact that the English common law system really never had an application to this country and second, that the English Government has changed the law, which is a very strong and established reason why we should place our commercial marine upon an equal footing with hers. *Why not give to those who navigate the ocean as many inducements to do so as England has done? Why not place them upon that great theatre where we are to have the great contest for the supremacy of the commerce of the world? That is what this bill seeks to do, and it asks no more*" (Id., p. 715).

Senator Butler and Senator Underwood, representing agricultural states, opposed the first section, the former saying: "You are going upon the broad proposition that

⁵ This Court in *The Eliza Lines*, 199 U. S. 119, 128, in an opinion by Mr. Justice Holmes, said: "Of course it is desirable, if there is no injustice, that the maritime law of this country and of England should agree." See also *Queen v. Globe & Rutgers Ins. Co.*, 263 U. S. 487, 493, where similar language is used.

when there is a loss by fire there shall be no liability. It is a principle which, if adopted, strikes deeply into an interest that concerns more persons than shipowners" (Id., p. 715). Senator Underwood said: "But if we are to retain this first section, changing the common law, which has been well settled since the case of Cox and Burnham I am opposed to it" (Id., p. 716).

In view of these and other objections the first section was finally amended by adding the following proviso: "Provided that nothing in this act contained shall prevent the parties from making such contract as they please, extending or limiting the liabilities of ship-owners". The bill then passed the Senate on February 27 (Id., p. 738). It passed the House on March 3rd with no debate and bare mention (Id., p. 777).

C. The interpretation of the Statute by this Court shows it provided complete and total exoneration or exemption from liability for cargo damage or loss by fire.

Although this Court has not previously had before it the precise question raised herein on this writ, it has frequently discussed the Statute and defined its meaning. It was first before this Court in 1860 in *Moore v. American Transportation Co.*, 24 How. 1, a fire case arising on the Great Lakes in which it was held that the Statute was applicable in spite of the last sentence which provided that the act did not apply to vessels "used on rivers or inland navigation". The Court (majority opinion by Mr. Justice Nelson) summarized the act as follows:

"The act not only exempts the owner from the casualty of fire, but limits his liability in cases of embezzlement or loss of goods on board by the master, officers etc., and also for loss or damage from collisions, and, indeed, for any loss or damage occurring without the privity of the owner, to an amount not exceeding the value of the vessel and freight" (p. 39).

The Statute was again before the Court in 1865 in *Walker v. The Transportation Co.*, 3 Wall. 150, where it was said:

"It is quite evident that the statute intended to modify the ship-owner's common-law liability for everything but the act of God and the king's enemies. We think that it goes so far as to relieve the shipowner from liability for loss by fire to which he has not contributed either by his own design or neglect. By the language of the first section the owners are released from liability for loss by fire in all cases not coming within the exception there made" (p. 153).

See to same effect *Craig v. Continental Ins. Co.*, 141 U. S. 638, 646.

In 1871, in *Norwich v. Wright*, 80 U. S. 104, this Court in an opinion by Mr. Justice Bradley discussing the Act of 1851 said:

"The first section exempts ship-owners from loss or damage by fire to goods on board the ship, unless caused by their own neglect" (p. 120).

In *Providence & N. Y. S. S. Co. v. Hill Mfg. Co.* (1883), 109 U. S. 578, the Act of 1851 was again before this Court in a case involving damage to cargo by fire and the Court analyzed carefully the relationship between section one, concerning a shipowner's liability for such fire damage, and section three, regarding his right to limit liability where the fire had occurred without his privity and knowledge. The issue was whether, the fire having been found by a state court jury to have been due to the neglect of the ship-owner under section one, such owners could file a petition for limitation of liability under section three. After discussing the legislative history of section one in the language quoted supra, page 10, this Court said in the majority opinion by Mr. Justice Bradley:

"In all cases of loss by fire, not falling within the exception, the exemption from liability is total. But there is no inconsistency or repugnancy in allowing

a partial exemption in cases falling within the third section; that is cases of loss by fire happening without the privity or knowledge of the owners. They may not be able under the first section, to show that it happened without any neglect on their part, or what a jury may hold to be neglect; whilst they may be very confident of showing, under the third section, that it happened without their privity or knowledge. *The conditions of proof in order to avoid a total or a partial liability under the respective sections are very different.*

It is true the owners of a ship may desire to contest all liability whatever, as well as to establish a limited liability if they fail in the first defence; and this they may do, as well in cases of loss by fire as in other cases, in one and the same proceeding. And we see no repugnancy between the two defences. One is a more perfect defence than the other and requires a different class or degree of proofs. That is all" (pp. 602-03).

The dissenting opinion by Mr. Justice Field concurred in by Mr. Justice Gray was based upon the theory that liability of shipowners for cargo damage by fire was controlled exclusively by section one (fire statute) and was not within section three governing limitation of liability; also that if a fire was caused by the design or neglect of the owner it necessarily must have been with his privity and knowledge (pp. 605-06). Even this dissent admitted that "*The first section exempts them [shipowners] from all liability for loss or damage by fire of goods shipped on board their vessels, unless such fire is caused by their design or neglect*" (p. 604). This interpretation, by all members of the Court, of the owner's liability under section one is not dictum but in view of the issues involved is a definite holding.⁶ This being true, it necessarily follows

⁶ The cited case was before this Court on writ of error to the Supreme Judicial Court of Massachusetts, which had taken jurisdiction of a suit brought by cargo owners and had entered a judgment for plaintiffs on verdict of a jury (113 Mass. 495 and 125 Mass. 292) despite the issuance of a restraining order in the limitation proceedings in the United States District Court for the Southern District of New York. This and other litigation arose out of

that section one extinguishes maritime liens on the owner's vessel as well as the owner's *in personam* liability. A similar case and a similar conclusion is to be found in *Hines v. Butler* (C. C. A. 4th), 278 F. 877, 879.

the loss by fire of the *Oceanus* with a valuable cargo aboard alongside her dock in New York on May 24, 1868. The value of the vessel in her wrecked condition was \$5,000. Other owners of cargo brought suit against the shipowner for their losses in the state courts of New York and Rhode Island. This Court held that the limitation proceedings in the District Court superseded all other actions and suits for the same loss or damage in the state or federal courts because losses by fire on board ship fell within both the first and third sections of the Act of 1851; and that, therefore, the Massachusetts court should not have proceeded further when the limitation proceedings were properly pleaded. The interpretation of both the first and third sections of the Act were necessary to this holding of the Court. The limitation proceedings before the United States District Court for the Southern District of New York are reported under the name of *In re Providence & N. Y. S. S. Co.*, 6 Ben. 124, Fed. Cas. No. 11,451 (1872). The question there before the Court was whether the shipowner (petitioner for limitation of liability) was entitled to an order therein restraining suits against it in other jurisdictions, the argument being made on behalf of plaintiffs in one of the state court suits that there was no right to file a petition to limit liability with respect to a claim for loss by fire which was governed solely by the first section of the Act of 1851, now 46 U. S. C. 182. In discussing the statute and deciding in favor of the shipowner, Blatchford, J., subsequently Mr. Justice Blatchford of this Court, said (20 Fed. Cas. at p. 20):

"But it by no means necessarily follows, that, because the fire happening to or on board the vessel was caused by the neglect of the corporation, so as not to give to it the benefit of the total exemption provided for by the 1st section, the loss by such fire of property shipped on board of the vessel was not a loss occasioned without the privity or knowledge of the corporation, so as to deprive it of the benefit of the limited liability provided for by the 3d section."

Inasmuch as the shipowner had filed a stipulation to cover the value of the vessel in the limitation proceeding, the cause was *in rem*; so that the above quoted holding that the shipowner was entitled to "total exemption" unless the loss were due to its design or neglect under the first section is, like the holding of this Court, supra, pp. 13-14, directly in point. In *Knowldon v. The Providence & N. Y.*

D. With the single exception of *The Etna Maru* (C. C. A. 5th), 33 F. (2d) 232, all of the cases under the Fire Statute where the point has been in issue have held that maritime liens on the ship for cargo damage are extinguished by the Statute unless the fire occurred with the personal design or neglect of the owner; the issue was not raised by brief or argument in the *Etna Maru* and the decision of the Circuit Court of Appeals was *sua sponte*.

The earliest reported case *in rem* for damage to cargo by fire following the Act of March 3, 1851 is *Dill v. Bertram*, Fed. Cas. 3910, in the United States District Court for the Southern District of New York in 1857. It was tried before

S. S. Co., 53 N. Y. 76 (1873). litigation regarding cargo loss arising out of the same disaster came before the Court of Appeals of New York on suit, brought by one of the cargo owners, the question before the Court being whether the shipowner was entitled to a stay because of the pendency of the limitation proceedings in the United States District Court for the Southern District of New York. In interpreting the statute the Court of Appeals, by Peckham, J., said:

"The purpose and language of this act would seem to declare that the loss by fire referred to in the first section, not caused by 'the design or neglect of the owners,' in no contingency could be compensated by any proposition of the value of the ship and freight to be distributed under the subsequent provisions. 'If the fire and loss occurred without' the design or neglect of the owners' of the ship, then it is declared that they incur no liability whatever" (p. 82).

* * * * *

"If the plaintiffs succeed in their action, they are entitled to recover their whole loss. If they fail, they are entitled to nothing. In no event are they entitled to any dividend in the value of the ship and freight that may be declared in the proceedings in the District Court" (p. 85).

The Court of Appeals was, as shown by the decision of this Court, in error in its conclusion that a loss by fire did not come under the third section of the Act of 1851. Its interpretation of the first section, however, that the shipowners "incur no liability whatever" for cargo loss by fire if caused without their design or neglect is sound and in accordance with all of the other authorities which have discussed the subject, with the single exception of the *Etna Maru*, supra.

Judge Betts, an experienced admiralty judge, who dismissed the libel with costs, saying:

"But if the saltpetre, under the facts, is to be regarded as laden on board the ship, then it is brought under the provisions of the Act of Congress of March 3, 1851 (9 Stat. 635 c. 43 § 1) and the loss and damage to it by fire alongside the ship, must be regarded as happening to goods 'shipped, taken in, or put on board' the ship, and the owners are therefore exempt from responsibility."

Next followed *Keene v. The Whistler*, Fed. Cas. 7645 (2 Sawy. 348), in 1873 in the District Court for the District of California. This was an action *in rem* for damage to cargo destroyed by fire on board the ship; the fire statute was pleaded in defense. The Court, after citing *Walker v. Transportation Co.*, 3 Wall. 150; *Wilson v. Dickson*, 2 Barn. & Ald. p. 13, and *The Volant*, 4 W. Rob. 383, said:

"From these authorities, it results that, though the negligent master, who is a part owner, is liable personally in either capacity for the loss caused by his negligence, the other innocent part owners are protected by the statute, in a suit brought against all the part owners jointly or *in rem* against the vessel, where the property must necessarily be taken to satisfy the decree; or if she has been bonded, the owners must satisfy the decree out of their own funds. The libel must therefore be dismissed."

Then followed *The Rapid Transit*, 52 F. 320, in the District Court for the District of Washington in 1892, in which the facts were that a steamer with a cargo of lime aboard took fire and was beached and scuttled to extinguish the flames causing the destruction of the lime. The owners of the lime libeled the ship *in rem* which in the meantime had been purchased by another who claimed the vessel and pleaded the fire statute. The Court dismissed the libel with an opinion reading:

"The claimant purchased the vessel after the fire, and he claims the protection of this statute on the

ground that if the former owners are, by its terms, shielded from liability upon their contracts, the vessel is also entitled to immunity from proceedings *in rem*. I find that there is in the proofs absolutely nothing to support an accusation against the owners of any intentional act or negligence which could have been the cause of the fire and consequent injury to the vessel and her cargo; therefore the statute affords a complete defense as against the claim originally put forth by the libelants" (p. 321).

Next in point of time was the *Etna Maru* (C. C. A. 5th), 33 F. (2d) 232, 234, in 1929. This was an action *in rem* for cargo damage by fire in which the shipowner pleaded the fire statute. The District Court entered decree for libellant on the ground that the owner had not exercised due diligence to make the ship seaworthy (20 F. (2d) 143). No suggestion was made in the District Court or in the Circuit Court of Appeals in either brief or argument that the fire statute would not relieve the owner's ship from liability *in rem* where the fire occurred without the owner's design or neglect. However, the Circuit Court of Appeals *sua sponte* held that the fire statute while relieving the owner *in personam* did not relieve the ship, in an opinion reading as follows:

"However, it seems to be the theory of appellant that, because of the provisions of the fire statute, if the owner is free from personal negligence, the ship is also exonerated in any event. * * * The statute relied on was part of the Act of March 3, 1851, carried into the Revised Statutes as sections 4282, 4283 et seq. (46 U. S. C. A. §§ 182, 183 et seq.). These sections are designed to modify the common-law liability of a shipowner, not only as to losses caused by fire, but also by collision and other accidents. They are in *pari materia* and must be construed together. They were not intended to, and do not, entirely excuse an owner for loss by fire in every event, even though not caused by his own design or negligence. This is tersely and clearly stated by Mr. Justice Bradley in *New York Cent. R. Co. v. Lockwood*, 15 Wall 357-361 where he

said referring to the act of 1851 and discussing limitation of carrier's liability generally: 'Though intended for the relief of the ship-owner, it still leaves him liable to the extent of his ship and freight for the negligence and misconduct of his employes and liable without limit for his own negligence.' See also *Walker v. Transp. Co.*, 3 Wall 150; *Norwich Co. v. Wright*, 13 Wall 104; *Providence & N. Y. S. S. Co. v. Hill Mfg. Co.*, 109 U. S. 578. * * * There is nothing in the statute to bar a recovery against the ship. *Richardson v. Harmon*, 222 U. S. 96; *Capitol Transp. Co. v. Cambria Steel Co.*, 249 U. S. 334; *The Malcolm Baxter Jr.*, 277 U. S. 323."

None of the cases cited in the opinion support the principle laid down. *New York Cent. R. Co. v. Lockwood*, 17 Wall. 357, was a case of personal injury to one riding on a drover's pass and neither a ship nor a fire was involved; the language of Mr. Justice Bradley was dictum. As I have shown supra, pages 13-14, this dictum is directly contrary to the holding of this Court in *Providence & N. Y. S. S. Co. v. Hill Mfg. Co.*, 109 U. S. 578, and to that of the United States District Court for the Southern District of New York and of the New York Court of Appeals in the same litigation (footnote 6, supra, p. 14). The doctrine of the *Etna Maru*, insofar as it held that lack of due diligence to make the vessel seaworthy would deprive the owner of the protection of the fire statute was expressly disapproved by this Court in *Earle & Stoddart, Inc. v. Ellerman's Wilson Line, Ltd. (The Galileo)*, 287 U. S. 420 (footnote 3 on p. 427). This Court likewise expressed doubt of the doctrine of the case that the statute did not relieve the owner's ship by calling attention to the fact in the same note that it was contrary to *The Rapid Transit*, 52 Fed. 320, 321. However, that point was not in issue since the *Galileo* action was not *in rem*.

The Salvore, 60 F. (2d) 683 (C. C. A. 2d) (1932), is next in point of time. The libel was both *in rem* and *in personam* for cargo damage by fire and the shipowner petitioned for exoneration from and/or limitation of liability. The fire

statute was pleaded. Decrees dismissing the libel and granting exoneration to the petitioner were affirmed, the Court on appeal saying:

"Likewise their" (libelants) "failure to prove either that the fire was caused by the neglect or design of the shipowner, since the burden was upon them, The Folmina, 212 U. S. 362, gives the ship the benefit of the fire statute (46 U. S. C. A. §182) which was incorporated in the bills of lading; Walker v. Western Transportation Co., 3 Wall 150, The Galileo, 54 F. (2d) 913."

No contention appears to have been made in that case, either in the District Court or in the Circuit Court of Appeals, that the fire statute was not applicable to suits *in rem*.

Likewise *The Older*, (1933) (C. C. A. 2d), 65 F. (2d) 359, was an action *in rem* and *in personam* for damage to cargo by fire. The fire statute was incorporated in the charter party. The Court reversed the decree below which held the ship liable (1 Fed. Supp. 119) and dismissed the libel. There is nothing in the reports to show any contention that the fire statute did not apply to a suit *in rem*.

Next followed *The President Wilson* (D. C., N. D. Cal., S. D. 1933), 5 Fed. Supp. 684. This was a libel *in rem* for loss by fire of 2,640 bags of sugar on board a barge. The fire statute was pleaded. The Court dismissed an *in rem* libel, stating:

"The libellant maintains that the 'fire statute' is not applicable in proceedings *in rem*. * * * First does the 'fire statute' apply? Libellant contends that the 'fire statute' is limited to personal exemption, and does not preclude liability against the vessel itself; and as this is an action *in rem*, recovery may, therefore, be had against ship. To sustain this position libellant relies upon *The Etna Maru* (D. C.), 20 F. (2d) 143, and *Id.* (C. C. A. 5th) 33 F. (2d) 232, 234. These *Etna Maru* decisions, *ubi supra*, are not convincing authority in support of libellant's contention. * * *

Undoubtedly, the weight of authority clearly holds that, in actions in rem for the recovery of damages caused by fire, the 'fire statute' grants immunity of liability to the vessel, as well as personal exemption; *ride The Rapid Transit* (D. C.), 52 F. 320; *Keene v. The Whistler*, Fed. Cas. No. 7645; *Dill v. The Bertram*, Fed. Cas. No. 3910. In the latter case the 'fire statute' was even construed to include cargo which had been brought alongside the ship for loading. In the very recent opinion in the cases of *Dingfelder et al. v. S. S. Brenta* (*Boera et al. v. S. S. Brenta*), 5 F. Supp. 682 *** the 'fire statute' precluded liability for a cargo of onions destroyed by fire" (685-6).

The next case in point of time was *The Buckeye State*, 39 Fed. Supp. 344 (D. C., W. D. N. Y. 1941). This was an action *in rem* for cargo damage by fire; the fire statute was pleaded in defense. The Court found the damage was due to heat rather than fire and decreed for libelant. With reference to whether the fire statute leaves the owner liable to the value of the vessel it said:

"The further claim is made by the libelant that where there is fire damage the fire statute *supra* leaves the owner liable to the value of the vessel and it cites the *Etna Maru*, 5 Cir., 33 F. 2d 232, 233, certiorari denied 280 U. S. 603. No implication is to be drawn from the denial of certiorari that the Supreme Court indicates any expression upon the merits. *Atlantic Coast Line R. Co. v. Powe*, 283 U. S. 401. The decision in *Etna Maru*, *supra*, seems to be against the weight of the authorities and not in accord with the plain meaning of the statute. *The Rapid Transit*, D. C., 52 F. 320; *The President Wilson*, D. C., 5 F. Supp. 684; *Keene v. The Whistler*, Fed. Cas. No. 7645; *Dill v. The Bertram*, Fed. Cas. No. 3910. In a footnote in *Earle & Stoddart v. Wilson Line* *supra*, reference is found to *Etna Maru* *supra* and the *Rapid Transit* *supra*. The indication there seems to be that the *Etna Maru* decision was disapproved" (pp. 346-7).

In the cause at bar the petitioner's first contended that the fire statute did not extinguish maritime liens for cargo.

damage in their brief in the Circuit Court of Appeals. The Circuit Court of Appeals in an opinion by Learned Hand, the most experienced admiralty judge in the Second Circuit, where a large proportion of the admiralty cases in the United States are brought, disposed of the contention as follows:

"A preliminary question arises as to the liability of the ship *in rem*, assuming that the owner is not liable *in personam*. The claimants argue that the statute does not destroy any liens upon the ship, for it is to be read in *pari materia* with § 183 of Title 46, U. S. Code. Such indeed appears to have been the opinion of the Fifth Circuit in *The Etna Maru*, 33 Fed. (2d) 232, which also held that unseaworthiness of the ship barred exoneration under the Fire Statute. So far as that decision retains any authority after *Earle & Stoddard v. Wilson Line*, 287 U. S. 420, we cannot agree. § 182 gives complete exoneration of liability; § 183 only a limitation of liability. To say that an owner is completely exonerated, although one may arrest his ship and sell it, is a contradiction in terms, unless we are to think of the ship as a jural person capable of wrongdoing. That notion has indeed had its place in the law of the sea, but it is a bit of mythology, a fiction not to be applied to defeat a statute designed to protect and foster maritime enterprise. Whether, if the charterer were liable, *in personam*, a lien would attach to the ship on the theory that a bareboat charterer is the owner *pro hac vice*, we need not say, for, as will appear, we agree that it was not liable *in personam*." (R. 63-4).

Petitioner's criticism (brief, pp. 19, 21-2) of the last two quoted sentences is quite unsound. What the Court clearly meant was that the ship was not a jural person, capable of wrongdoing by itself; that a lien can only arise by reason of the wrongdoing of a person "lawfully in possession of her whether as owner or charterer" (*The Barnstable*, 181 U. S. 464, 467); that the respondent bareboat charterer, in rightful possession of the vessel, did not create a lien on her for the damage by fire since the fire statute had exon-

erated it from any such damage caused without its design or neglect.

See also "The Limited Liability of *Ship-Owners for Master's Faults*" by Harrington Putnam, Esq., 17 Amer. Law Review 1, 14 where in discussing the Act of 1851 it is said: "*The first section giving complete immunity in case of fire and the second section requiring notice of valuables shipped to be given in writing need no comment.*" Judge Putnam was an eminent proctor in admiralty and was counsel in many important cases in this Court.

Inasmuch as the first section of the Act of 1851 (Fire Statute) has been uniformly construed for a period of almost 90 years (with the exception of *The Etna Maru*, supra, which was an exotic in our law and for which there is no authority) as completely exonerating the shipowner from liability not only in a suit *in personam* but also from liability in a suit *in rem* against his vessel, the construction thus adopted should not be disturbed.

This Court has frequently pointed out that a long and uniform construction given to a federal statute by the lower federal courts ought not to be set aside. The rule is thus summarized in the headnote to *Missouri v. Ross, Trustee*, 299 U. S. 72:

"This Court will hesitate to disturb a long and uniform construction given to a federal statute by the lower federal courts; and the fact that the provision so construed has not been changed by Congress, although provisions closely related to it have been amended, imports a legislative adoption of such construction. (P. 75.)"

So in *United States v. Ryan*, 284 U. S. 167, the present Chief Justice said at page 174 in discussing the interpretation of R. S. §3453:

"If the point were more doubtful, we should hesitate to set aside, at this late date, the uniform construction given to the section with respect to this question by the lower federal courts for more than sixty years."

The construction of the Fire Statute advanced in *The Etna Maru*, supra, would nullify it except in case of the vessel's total loss because the cargo owner could always avoid the immunity given by bringing his action *in rem*. This construction would in effect change the Statute in actions *in rem* from one of exonerations to one of mere limitation of liability to the value of the vessel thus making it substantially equivalent to the third section of the Act of March 3, 1851. But this would be contrary to the holding of this Court in *Providence & N. Y. S. S. Co. v. Hill*, 109 U. S. 578, in which the liability under the two statutes is contrasted. It would add a new exception to the "complete immunity granted" by the Fire Statute contrary to this Court's holding in *Earle & Stoddard v. Wilson Line*, 287 U. S. 420, 425.

II

While there was a maritime lien upon the *Venice Maru* for damage by fire to her cargo, it was based upon the loading of such cargo upon her pursuant to the agreement between the bareboat charterer-respondent and the shippers; the master was the employee of said respondent and, even had he signed the bills of lading (which he did not), they would have been the contracts of such respondent and not independent contracts of the master or vessel, as petitioners contend.

Petitioners' brief is unreal. Apparently abandoning any defense of the decision of the Circuit Court of Appeals for the Fifth Circuit in *The Etna Maru*, 33 F. (2d) 232, upon the ground given by that Court—namely, that the first and third sections of the Act of 1851 are *in pari materia*—it contends that, in the cause at bar, the contract of transportation was made by the master and created a maritime lien upon the ship independently of any contract of either of the respondents. From this it argues

that the maritime lien on the vessel was in no way connected with the liability of either of the respondents and *ergo* was not extinguished by the Fire Statute. Nothing could be further from the fact.

The District Court below expressly found that the bills of lading were "duly issued either by the head office of the" respondent bareboat charterer which operated the vessel or "by one of its sub-offices or by its duly authorized agents" (Findings 2 & 3, R. 40). Answers of said charterer respondent to the 37th, 38th and 45th interrogatories, annexed to petitioners' answer, which were offered in evidence at the trial by petitioners, specifically showed that the bills of lading were *signed* by the head office or the sub-offices or duly authorized agents of said respondent bareboat charterer; these answers, while printed in the complete record (pp. 44-45) in the Circuit Court of Appeals, were not included in the brief transcript of record which was stipulated in this Court in view of the limitation of the question to be presented (R. 71). In order that there may be no misunderstanding, I shall take the liberty of printing these three interrogatories and their answers from the Record in the Circuit Court of Appeals as Appendix B (*infra* p. 39).

The printed words "for master" at the end of the front page of the printed form of the bill of lading (Ex. 9, R. 30), underneath the space left for the signature, do not make what otherwise is a charterer's contract into an independent master's contract. The document bears both the trade name ("K" Line) and the common name (Kawasaki Kisen Kaisha, the word "Kabushiki" meaning Incorporated being omitted,) of the respondent charterer at the top and states in its body that the vessel belongs to or is employed "by The Kawasaki Kisen Kaisha (hereinafter called Carriers) commanded by T. Inouye for the present voyage ***". At the bottom of the front page, following the notation of the marks and numbers of the merchandise and of the freight and charges, appears the clause, "In witness whereof, *the owners or agents of the*

said vessel have signed—Bills of Lading, one of which Bills of Lading being accomplished the others to stand void". At the bottom of the front page on the extreme left side, in parenthesis, are the words "Subject to conditions and exceptions as per overleaf". The overleaf is the back page of the bill of lading (R. 30 B) where are to be found the exceptions and conditions of the contract between the shipper and "the carrier" which had been previously identified on the front page as respondent bareboat charterer. The contract was clearly that of said respondent and not an independent contract for the ship by the master who never even signed the document. Even had the master signed it, the contract would still have been that of the respondent charterer since he was its employee under the terms of the charter party which provided (Article No. Two) that "the charterers, at their own risk and expense, carry all the business of these steamers' operations, such as appointments, dismissal of officers and crew • • •" (R. 31-2).

This Court in *Pendleton v. Benner Line*, 246 U. S. 353, held that bills of lading signed by the master of a vessel were, nevertheless, contracts of the charterer, saying:

"The bills of lading were signed by the master or agents of the vessel (the Benner Line) and it is contended, bound only the vessel. • • • We agree with the lower Courts that the Benner Line did not disappear from its contract to carry the goods when the bills of lading were signed and that it would have been answerable to the owners, or to the insurance companies, when they became subrogated to the owners' rights, if they had elected to sue it" (p. 355).

As the charter involved in the cited case was not a demise, the master was the employee of the owner, not the charterer; in the cause at bar, the charter was a demise and the master was the employee of the charterer. There is therefore even more reason for holding that the bill of lading in the cause at bar is the contract of the charterer than there was for such a holding in *Pendleton v. Benner Line*, supra. The petitioners herein understood this fully;

their libels were *in personam* against the charterer-respondent on the bill of lading contract and *in rem* against the *Venice Maru*, not solely *in rem* as one might infer from their brief at page 4.

The cases cited by petitioners on maritime liens for mariner's wages, or liens under statutes for forfeiture of vessels which engage in prohibited activities, or liens arising out of collisions, or liens for necessaries furnished to a vessel are all inapplicable. They are based upon different grounds than a lien for cargo damage. There is no such thing as a master's independent contract of affreightment; he is always acting as an agent, either for the owner or the charterer and the contract is that of his principal. Nor is there ever in reality any vessel contract of affreightment independent of that of her owner or charterer. The lien upon a ship for the safe carriage, due transport and right delivery of cargo is created solely by the union of ship and cargo which takes place when the goods are loaded aboard the ship pursuant to a contract of affreightment between the shipper and carrier and such lien is no more substantial even if the ship's master signs the bill of lading. In fact no bill of lading is necessary for the creation of such a lien. *The Saturnus* (C. C. A. 2d), 250 F. 407. The lien is reciprocal, the ship being bound to the cargo to carry out the agreement of transportation and the cargo bound to the ship for freight and charges. *The Maggie Hammond*, 9 Wall. 435, 449-50; *Schooner Freeman v. Buckingham*, 18 How. 182; *Osaka Shosen Kaisha v. Pacific Export Lumber Co.*, 260 U. S. 490.

As this Court said in its opinion by the present Chief Justice in *Krauss Bros. Lumber Co. v. Dimon S. S. Corporation*, 290 U. S. 117, 121:

"While there has been a lack of unanimity in the decisions as to the precise limits of the lien in favor of the cargo, see *Osaka Shosen Kaisha v. Pacific Export Lumber Co.*, 260 U. S. 490, the cases are agreed that the *right to the lien has its source in the contract of affreightment and that the lien itself is justified as a*

means by which the vessel, treated as a personality or as impliedly hypothecated to secure the performance of the contract, is made answerable for nonperformance. See *The Freeman*, 18 How. 182, 188; *Vandewater v. Mills*, 19 How. 82, 90; *Osaka Shosen Kaisha v. Pacific Export Lumber Co.*, *supra*; *The Flash*, 1 Abb. Adm. 67; *The Rebecca*, 1 Ware. 188; *Scott v. The Ira Chaffee*, 2 Fed. 401. This engagement of the vessel, or its hypothecation, as distinguished from the personal obligation of the owner, does not ensue upon the mere execution of the contract for transportation. Only upon the lading of the vessel or at least when she is ready to receive the cargo—when there is ‘union of ship and cargo’—does the contract become the contract of the vessel and the right to the lien attach. No lien for breach of the contract to carry results from failure of the vessel to receive and load the cargo or a part of it. See *The Osaka Shosen Kaisha v. Pacific Export Lumber Co.*, *supra*.⁷

⁷ There is nothing to the contrary of this rule in the cases cited by petitioner. *The Esrom* (C. C. A. 2d), 262 F. 953 and 272 F. 266, which involved goods shipped on a vessel that was under a charter which was not a demise, held: “The ship may be held liable in rem for damages to the cargo even though no bill of lading or contract of affreightment is signed by the master” (p. 269 of 272 F.). “*** the obligation between the ship and cargo is mutual and reciprocal and does not attach until the cargo is onboard or in the custody of the master” (p. 270 of 272 F.). “There did exist between shipper and the personified ship mutual obligations dependent wholly upon that union of ship and goods arising from the lading of the former on the latter, lately discussed at some length in *The Saturnus*, 250 F. 407. But that union did not *per se* give rise to any ‘privilege’ under continental marine law even for damages through delay occasioned by the fault of the owner: *The Ripon City*, 102 F. 182” (p. 273 of 272 F.). In *The Themis* (*Gans S.S. Lines v. Wilhelmsen*) (C. C. A. 2d), 275 F. 254, 262, it was held: “It is sufficiently shown in Judge Hand’s opinion that by acceptance of cargo, the ship became liable in rem for due performance of the contract of affreightment. But when (Barber & Co.’s authority to sign for the master being undisputed) the master of a ship chartered but not demised which was the condition of *Themis*, issues bills of lading, we hold that the contract evidenced thereby is not only the ship’s contract and that of the time or other charterer who caused their issue, but that of the owner, whose master (i. e. authorized agent) issued the same. Therefore, in this instance the shippers had, beyond the obligations of the ship,

There is no liability on the ship unless there is liability on the owner or operator under the contract of affreightment. The general owner in the cause at bar was not

right to look to all three respondents, and hold any or all of them personally liable for right fulfilment of the bills." In *The Poznan* (C. S. D. N. Y.), 276 F. 418, 432, Judge Learned Hand said in a suit in rem against the ship, her owner and time charterer: "Thus the charter party clearly contemplated bills of lading running in the name of the Acme Company (charterer) and they all so read. Most of them were in fact signed by the company but a few by the master. So far as concerns the ship it makes no difference. Being once laden she was bound for right delivery though the charterers sign. The *Triptides* (D. C.), 52 Fed. 161; *The Centurion* (D. C.), 57 Fed. 2; *The Freda* (D. C.), 266 Fed. 551. In *The Esrom* (No. 2), 272 Fed. 266 (C. C. A. 2d), Feb. 24, 1921, it was agreed by all the judges that the charterer's bill of lading bound the ship for right delivery. Indeed the cargo would have a 'privilege' against the ship for right delivery, even without any bill of lading. *The Saturnus* (C. C. A.), 250 Fed. 407." In *The Capitaine Faure* (C. C. A., 2d), 10 F. (2d) 950, the Court held a ship liable in rem to cargo loaded aboard her where the bills of lading were signed by the time charterer with the consent of the owner's master and said: "A contract of affreightment binds the ship must be executed by a person authorized to do so by the shipowner, * * *" (p. 961). In *The Saturnus* (C. C. A. 2d), 250 Fed. 407, 414, the Court in an opinion by Judge Hough said: "This litigation exemplifies a common tendency to regard any floating property used in the performance of a contract, as in some sort of pledge or surety for satisfactory performance; such security to be enforced by asserted maritime lien. No such principle is known in the admiralty. The ancient and customary lien of the sea is not maintained, nor was it created (so far as history reveals its origin) for the convenience or assurance of parties, but for the encouragement of commerce and shipping, as a presumed benefit to the public, in respect of an occupation hazardous and uncertain beyond most land ventures. In respect of carriage of goods in particular, every public benefit has for centuries been deemed obtained when goods were liable for freight, and ship for safe and sound delivery of goods, the mutuality of relation thus growing out of the nature of transport, not the making of a contract for transportation. Anything more than this multiplies secret liens and hampers instead of advancing ease and freedom of commerce" (p. 414). If the Phebe and Cas. No. 11064 (brief pp. 48-62) holds more than this it is contrary to prevailing authority. There is no special significance to be given to a bill of lading signed by the master except that where he is appointed and paid by the shipowner and the vessel is under a charter which is less than a demise it may bind the owner *in personam* on the principles of agency. Such a bill of lading has no such significance as petitioner contends at brief pp. 23-26.

liable because it made no contract with the shippers and had nothing to do with the ship's operation, stowage or control (Finding 1, R. 40). The operator (respondent bareboat charterer), under whose contract of affreightment the cargo was loaded, was freed from liability for damage to such cargo by fire under the provisions of the Fire Statute from which it follows that the vessel was likewise freed since "the right to the lien has its source in the contract of affreightment" (*Krauss Bros. Lumber Co. v. Dimon S.S. Corporation*, supra p. 27). This is the sense in which the Circuit Court of Appeals wrote the following words which have been unwarrantedly criticized by the petitioner:

"To say that an owner is completely exonerated, although one may arrest his ship and sell it, is a contradiction in terms, unless we are to think of the ship as a jural person capable of wrongdoing. That notion has indeed had its place in the law of the sea, but it is a bit of mythology, a fiction not to be applied to defeat a statute designed to protect and foster maritime enterprise. Whether, if the charterer were liable *in personam*, a lien would attach to the ship on the theory that a bareboat charterer is the owner *pro hac vice*, we need not say, for, as will appear, we agree that it was not liable *in personam*" (R. 63-4).

This was a sound application of the law as laid down by this Court in the affreightment cases cited above. No judge in the country has been more mindful of "the Admiralty tradition" which petitioner appears to feel is in process of destruction (brief, 22-3) or more zealous in its protection than Judge Learned Hand who wrote the opinion in the Circuit Court of Appeals. In his continuous service of more than thirty-four years as a federal judge he has passed upon, either as trial judge or appeal judge, many of the most important admiralty cases that have arisen in the Second Circuit, including a number of those cited in petitioners' brief.

Judge Goddard in *The Cabo Hatteras*, 5 Fed. Supp. 725, 728 (D. C., S. D. N. Y.), called attention to the fact that section three of the Act of 1851 which provides for limitation

of liability "is merely an enactment of the ancient law of the sea while the fire statute which is not a statute of limitation but of exoneration, owes its origin to an English fire statute first passed in 1786 (26 Geo. III c 86)". From this one may properly infer that insofar as the fire statute was concerned it was the Court's opinion that it was not encumbered with any of the ancient doctrines of the sea but was free and absolute. There are many customs and usages of the sea that are not part of the law of admiralty as enforced in our courts. As this Court said in *The Western Maid*, 257 U. S. 419, majority opinion by Mr. Justice Holmes:

"In deciding this question we must realize that however ancient may be the traditions of maritime law, however diverse the sources from which it has been drawn, it derives its whole and only power in this country from its having been accepted and adopted by the United States. There is no mystic overlaw to which even the United States must bow. When a case is said to be governed by foreign law or by general maritime law that is only a short way of saying that for this purpose the sovereign power takes up a rule suggested from without and makes it part of its own rules. *The Lottawanna*, 21 Wall. 558, 571, 572; *Dalrymple v. Dalrymple*, 2 Hagg. Cons. 54, 58, 59; Dicey, *Conflict of Laws*, 2d ed. 6, 7. * * * It may be said that the persons who actually did the act complained of may or might be sued and that *the ship for this purpose is regarded as a person*. But that is a fiction not a fact and as a fiction is a creation of the law. It would be a strange thing if the law created a fiction to accomplish the result supposed." (pp. 432-3).

As the Circuit Court of Appeals below said, this "fiction" of personality of the ship is "not to be applied to defeat a statute designed to protect and foster maritime enterprise." (R. 63).

There is no significance in the fact that 46 U. S. C. 181, section two of the Act of 1851, concerning valuable cargo shipped without notice, excuses both the master and

the owner from liability whereas section one excuses merely the owner (brief 6, 13). As the master was the person who was to receive the article from the shipper, and if its value was disclosed enter the amount thereof in the bill of lading, he was personally liable therefor, so that it was only proper that he should be released from liability for more than the value of the goods as declared by the shipper. For all other embezzlement, injury, loss and destruction he and the officers and mariners were liable under section six of the Act—46 U. S. C. 187. "By the English and American maritime law the master is responsible for the loss of cargo equally with the owners without reference to any personal fault of his own, but by reason of his accountability for the acts or omissions of his subordinates, as a kind of subrogated principal, says Story, and qualified owner; * * *". *The City of New York* (D. C. S. D. N. Y.), 25 Fed. 149, 152.

Petitioners appear to think (brief p. 15)—that there is significance in the fact that section five of the Act of 1851, 46 U. S. 186, after providing that a demise charterer should be deemed the owner thereof within the meaning of the act, states that a ship "when so chartered shall be liable in the same manner as if navigated by the owner thereof". The fact is that the draftsman in the part of the sentence following the semicolon was merely expressing the legal effect of what he had said in the part before the semicolon, i.e., that the ship should not be liable to any greater extent for damage to cargo by fire when navigated by a bareboat charterer than when navigated by her general owner.

Petitioners' argument that the Fire Statute of 1851 should be restricted to *in personam* liability alone because the Harter Act of 1893 and the Carriage of Goods by Sea Act of 1936 specifically mention both owner and ship (brief 9, 11, 12, 30-1), while the Fire Statute only mentions shipowner, is of no legal weight. As this Court (opinion by Mr. Justice Douglas) said of a similar argument in

United States v. Stewart, 311 U. S. 60, 69: "Suggestive as this analysis is, it is entitled to little weight. No mere collation of other statutes can be decisive in determining what the instant statute means. *The meaning of each phrase must be closely related to the time and circumstance of its use.*"

The Carriage of Goods by Sea Act of 1936 was intended to implement the provisions of the Brussels Convention, consented to by the Senate April 1, 1935, the primary purpose of which was to secure international uniformity in ocean bills of lading. The language adopted in the fire clause of the Act was identical with the State Department's translation of the Convention and did not undertake to change the established law of eighty-five years. The Fire Statute was specifically continued in force by the Act (46 U. S. C. 1308).

While it is true, as petitioner states (brief 6, 12), that the bill of lading referred to the Harter Act, it also in the same clause (Ex. 9, clause 26, R. 30 B) referred to the Fire Statute and Limited Liability Act (R. S. 4281, 4282, 4283) and The British Merchants Shipping Act, which latter included the British Fire Statute.

III

CONCLUSION

The Fire Statute, 46 U. S. C. 182, extinguishes maritime liens for cargo damage by fire on the shipowner's vessel as well as the owner's *in personam* liability therefor.

The foregoing shows that the Fire Statute completely exonerates the shipowner from liability for damage to cargo by fire on board his vessel, which necessarily means extinguishing any maritime liens upon his vessel for such losses. This appears (a) from the plain language used in

the Statute, (b) from its legislative history which shows that its purpose was to encourage the American merchant marine and to put it on an equal basis with the English merchant marine, (c) from the liberal interpretation of the Statute by this Court in numerous decisions and (d) by the long line of cases in the lower federal courts covering a period of nearly ninety years since its enactment. It also shows (1) that the maritime lien for cargo loss or damage arises out of the union of cargo and ship which occurs when the cargo is laden aboard pursuant to a contract of affreightment; (2) that the contracts of affreightment in the cause at bar were made by the respondent bareboat charterer with the shippers so that the lien was inseparably connected with the *in personam* liability of such respondent; (3) that there is no reality to the suggestion of any independent contract of affreightment of the master or the vessel even where the bill of lading is signed by the master, as the contract in all such cases remains that of the master's principal, i.e., the respondent charterer in the cause at bar.

Wherefore the final decree below should be in all respects affirmed with costs.

Respectfully submitted,

GEORGE C. SPRAGUE,
Counsel for Respondents.

October 13, 1943.

(Emphasis throughout is mine.)

APPENDIX A

Chap. XLIII. An Act to limit the Liability of Ship-
Owners and for other Purposes, approved March 3, 1851,
9 Stat. 635.

"Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That no owner, or owners of any ship or vessel shall be subject or liable to answer for or make good to any one or more person or persons any loss or damage which may happen to any goods or merchandise whatsoever, which shall be shipped, taken in or put on board any such ship or vessel, by reason or by means of any fire happening to or on board the said ship or vessel, unless such fire is caused by the design or neglect of such owner or owners, Provided that nothing in this Act contained shall prevent the parties from making such contract as they please, extending or limiting the liability of ship-owners."

Sec. 2. And be it further enacted, That if any shipper or shippers of platina, gold, gold dust, silver, bullion, or other precious metals, coins, jewelry, bills of any bank or public body, diamonds or other precious stones, shall lade the same on board of any ship or vessel, without at the time of such lading, giving to the master, agent, owner or owners of the ship or vessel receiving the same, a note in writing of the true character and value thereof, and have the same entered on the bill of lading therefor, the master and owner or owners of the said vessel shall not be liable, as carriers thereof, in any form or manner. Nor shall any such master or owners be liable for any such valuable

* The proviso was deleted in 1874 (Rev. Stat., 5596); also in carrying the Act over into the Revised Statutes the words "subject to" were omitted; otherwise the section remains as originally enacted and is 4282 of the Revised Statutes, 46 U. S. C. 182.

goods beyond the value and according to the character thereof so notified and entered.⁹

Sec. 3. And be it further enacted, That the liability of the owner or owners of any ship or vessel, for any embezzlement, loss or destruction by the master, officers, mariners, passengers, or any other person or persons, of any property, goods, or merchandize, shipped or put on board of such ship or vessel, or for any loss, damage or injury by collision, or for any act, matter or thing, loss, damage or forfeiture, done, occasioned or incurred without the privity or knowledge of such owner or owners, shall in no case exceed the amount or value of the interest of such owner or owners respectively, in such ship or vessel, and her freight then pending.¹⁰

Sec. 4. And be it further enacted, That if any such embezzlement, loss or destruction shall be suffered by several freighters or owners of goods, wares or merchandise, or any property whatever on the same voyage, and the whole value of the ship or vessel, and her freight for the voyage, shall not be sufficient to make compensation to each of them, they shall receive com-

⁹ The Act of Feb. 28, 1871, c. 100, 16 Stat, 458, added to the section as originally enacted the following clause immediately after the words "diamonds or other precious stones", to wit, "or any gold or silver in a manufactured or unmanufactured state, watches, clocks, or timepieces of any description, trinkets, orders, notes, or securities for payment of money, stamps, maps, writings, title deeds, printings, engravings, pictures, gold or silver plate or plated articles, glass, china, silks in a manufactured or unmanufactured state, and whether wrought up or not wrought up with any other material, furs or lace, or any of them, contained in any parcel, or package or trunk"; it also added the words "as freight or baggage" after the words "shall lade the same". The section is Revised Statutes 4281, 46 U. S. C. 181.

¹⁰ With the exception of minor verbal changes this section remained as originally enacted until amended in 1935 and 1936 (Aug. 29, 1935, c. 804, par. 3, 49 Stat. 960; June 5, 1936, c. 521, par. 1, 49 Stat. 1480) as an aftermath of the *Morro Castle* disaster to give a greater remedy to claimants for loss of life and bodily injuries, increasing the amount of the limitation fund for their benefit to \$60 per gross ton. As amended the section is 46 U. S. C. 183; additional provisions added by the above amendments are 46 U. S. C. 183b and 183c.

pensation from the owner or owners of the ship or vessel, in proportion to their respective losses; and for that purpose the said freighters and owners of the property, and the owner or owners of the ship or vessel or any of them, may take the appropriate proceedings in any court for the purpose of apportioning the sum for which the owner or owners of the ship or vessel may be liable amongst the parties entitled thereto. And it shall be deemed a sufficient compliance with the requirements of this act, on the part of such owner or owners, if he or they shall transfer his or their interest in such vessel and freight, for the benefit of such claimants, to a trustee, to be appointed by any court of competent jurisdiction, to act as such trustee for the person or persons who may prove to be legally entitled thereto, from and after which transfer, all claims and proceedings against the owner or owners shall cease.¹¹

Sec. 5. And be it further enacted, That the charterer or charterers of any ship or vessel, in case he or they shall man, victual and navigate such vessel at his or their own expense, or by his or their own procurement, shall be deemed the owner or owners of such vessel within the meaning of this act; and such ship or vessel, when so chartered, shall be liable in the same manner as if navigated by the owner or owners thereof.¹²

Sec. 6. And be it further enacted, That nothing in the preceding sections shall be construed to take away or affect the remedy to which any party may be entitled, against the master, officers, or mariners, for or on account of any embezzlement, injury, loss or destruction of goods, wares, merchandise, or other property,

¹¹ The last sentence of this section was later separated from the rest and made into a new section as 4285 of the Revised Statutes, 46 U. S. C. 185. It was amended to conform to the changes made in Sec. 183 of U. S. C. by the Act of June 5, 1936, c. 521, par. 3, 49 Stat. 1480, previously referred to in footnote 10. The first part of the section is 4284 of the Revised Statutes, 46 U. S. C. 184. Only minor changes have been made from the form in which it was originally enacted.

¹² Only minor changes have been made from the section as originally enacted; it is 4286 of Revised Statutes, 46 U. S. C. 186.

put on board any ship or vessel, or on account of any negligence, fraud or other malversation of such master, officers or mariners, respectively, nor shall any thing herein contained lessen or take away any responsibility to which any master or mariner of any ship or vessel may now by law be liable, notwithstanding such master or mariner may be an owner or part owner of the ship or vessel.¹³

Sec. 7. And be it further enacted, That any person or persons shipping oil of vitriol, unslacked lime, inflammable matches or gunpowder, in a ship or vessel taking cargo for divers persons on freight, without delivering, at the time of shipment, a note in writing, expressing the nature and character of such merchandise, to the master, mate, officer, or person in charge of the lading of the ship or vessel, shall forfeit to the United States one thousand dollars.¹⁴

This act shall not apply to the owner or owners of any canal boat, barge or lighter, or to any vessel of any description whatsoever used in rivers or inland navigation.¹⁵

Approved, March 3, 1851."

¹³ Only minor changes have been made to the section as originally enacted; it is 4287 of Revised Statutes, 46 U. S. C. 187.

¹⁴ Only minor changes have been made to the original as enacted; it was Revised Statutes 4288 and is 46 U. S. C. 175.

¹⁵ This limitation sentence was superseded by Act of June 19, 1886, c. 421, par. 4, 24 Stat. 80, reading as follows:

"The provisions of the six preceding sections, and of sections 175 and 189, shall apply to all seagoing vessels, and also to all vessels used on lakes or rivers or in inland navigation, including canal boats, barges and lighters."

A minor technical amendment was made June 5, 1936, c. 521, par. 4, 49 Stat. 1481. It was Revised Statutes 4289 and is 46 U. S. C. 188. Section 189 of 46 U. S. C. was Section 18 of the Act of June 26, 1884, c. 121, par. 18 (23 Stat. 57), entitled "An Act to Remove Certain Burdens on the American Merchant Marine and Encourage the American Foreign Carrying Trade and for Other Purposes." This section has not been amended since the enactment.

APPENDIX B

THIRTY-SEVENTH INTERROGATORY: Were not space contracts for the carriage of all merchandise loaded on the Steamship *Venice Maru* at Kobe made by duly authorized representatives of petitioner Kawasaki Line.

Ans. Such space contracts were made by duly authorized representatives of petitioner Kawasaki Kisen Kabushiki Kaisha.

THIRTY-EIGHTH INTERROGATORY: Were not all the contracts of carriage contained in bills of lading, issued for the merchandise stowed on the Steamship *Venice Maru* at Kobe signed by a duly authorized employee of the petitioner Kawasaki Line.

Ans. All bills of lading for cargo loaded on *Venice Maru* at Kobe were signed by duly authorized employees of petitioner Kawasaki Kisen Kabushiki Kaisha.

FORTY-FIFTH INTERROGATORY: State whether the duly authorized general agent of the Kawasaki Line at Nagoya had in July of 1934 full authority to issue under the control and supervision of the petitioners or either of them bills of lading covering cargo shipped at Nagoya on board vessels owned or operated by the petitioners.

Ans. Kanigumi & Co. had authority to issue bills of lading for cargo at Nagoya actually shipped aboard vessels owned or operated by the petitioner Kawasaki Kisen Kabushiki Kaisha.

OCT 26 1943

CHARLES ELMORE DUNPHY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM 1943

No. 32

In the Matter

of the

Petition of KABUSHIKI KAISHA KAWASAKI ZOSENJO, Owner,
and KAWASAKI KISEN KABUSHIKI KAISHA, Bareboat Char-
terer of the Steamship "VENICE MARU", for Exoneration
from and Limitation of Liability.

CONSUMERS IMPORT CO., INC., et al.,
Cargo Claimants-Petitioners,

KABUSHIKI KAISHA KAWASAKI ZOSENJO and
KAWASAKI KISEN KABUSHIKI KAISHA,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT
OF APPEALS FOR THE SECOND CIRCUIT.

RESPONDENTS' REJOINDER TO PETITIONERS' REPLY BRIEF

GEORGE C. SPRAGUE,
Counsel for Respondents.

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**RESPONDENTS' REJOINDER TO PETITIONERS'
REPLY BRIEF**

This rejoinder is filed pursuant to leave of the Court, granted on argument of the cause on October 21.

Petitioners' position (reply brief, 36) that the words of this Court in *The City of Norwich*, 118 U. S. at page 503, commencing with the sentence, "To say that an owner is not liable, but that his vessel is liable, seems to us like talking in riddles", merely meant that the owner's interest

in the vessel on a subsequent voyage after fresh capital had been added was not liable under the limitation statute, is *untenable*.

This Court had already discussed and decided two questions before using the language in the paragraph quoted at page 6 of my main brief, namely:

- (1) The time and place where the value of the ship was to be taken for limitation purposes;
- (2) Whether petitioners were to account for insurance monies received.

It then passed to a third question which it stated at page 502 as follows:

"It is next contended that the act of Congress does not extend to the exoneration of the ship, but only exonerates the owners by a surrender of the ship and freight, and, therefore, that the plea of limited liability cannot be received in a proceeding in rem."

It was in answer to this contention that it used the language at page 503 which I quoted. The fact that this Court incidentally mentioned the matter of repairs and betterments in a few brief sentences between the statement of the contention on page 502 and the answer thereto on page 503 does not mean that such answer referred merely to the matter of repairs and betterments which it had already discussed in answering the question of the time and place where the value was to be taken. There can be no doubt that the quoted language was in answer to the specific contention that the "plea of limited liability cannot be received in a proceeding in rem". Following the language quoted by me at page 6 of my main brief, the Court amplified its holding as follows:

"His [owner's] property is what those who deal with him rely on for the fulfilment of his obligations. Personal arrest and restraint, when resorted to, are merely means of getting at his property. Certain parts of his property may become solely and exclusively liable for certain demands, as a ship bound in bottomry, or

subject to seizure for contraband cargo or illegal trade; and it may even be called the 'guilty thing'; but the liability of the thing is so exactly the owner's liability, that a discharge or pardon extended to him will operate as a release of his property" (p. 503).

The suggestion at page 14 of petitioners' reply brief that Senator Hamlin's statement, "His vessel is in hazard in any event", meant that *in rem* liabilities were not being extinguished, is unwarranted. These words referred to the condition sought to be remedied by the fifth section of the Act, which provided that a demise charterer should be deemed an owner within the terms of the Act, as clearly appears from the context. The full quotation is as follows:

"The fifth section provides that where A charters the vessel to B, he shall not be held liable for the debts of B. The principle may be illustrated in this way; If I should loan a horse and carriage at a livery stable, as the law now stands, the owner of that livery stable would not be liable for any malfeasance I might do. *But as the law now stands in relation to the owners of vessels, the owner is liable for the acts of the person who may charter his vessel. His vessel is in hazard in any event. His fortune may be lost; and after all that, as the law now stands, you make him responsible for the debts and liabilities of the person to whom he has chartered his vessel.* By parity of reason you make the owner of the livery stable liable for the injury I might occasion to an individual when driving the horse which I have loaned from him" (23 Congl. *Globe, p. 715, 2d col.).

Contrary to petitioners' contention, this quotation clearly shows that the purpose of the fifth section was to eliminate any lien on a vessel, while under demise charter, for the act of the charterer where such act was within the exemption of the Fire Statute. That was the situation at bar.

The English cases discussed at pages 3 to 6 of petitioners' reply brief which were cited by Judge Hough in

his decision in *Gans S. S. Line v. Wilhelmsen (The Themis)*, 275 F. 254, lend no support to petitioners' contention. They all involved *time charters* of vessels (*not demise charters as in the cause at bar*) and the only question was whether or not the bills of lading bound the general owner *in personam*. *No actions in rem were involved.*

Tillmans & Co. v. S. S. Knutsford, Ltd., L. R. 1 K. B. [1908] 185; affirmed 2 K. B. 385 [1908] (C. A.), 406; affirmed 1908.A. C. 406 (H. of L.),

was a suit against the general owner of the vessel on four bills of lading all of which contained the printed words "*for the captain and owners*" under the signature; three of such bills of lading were signed by the captain and one by the time charterers. The charter party provided that

"The captain (although appointed by the owners) shall be under the orders and direction of the charterers as regards employment, agency, or other arrangements; and the charterers hereby agree to indemnify the owners from all consequences or liabilities that may arise from the captain signing bills of lading by the order of charterers * * *" (p. 187).

The trial court held that the defendant owner was bound, by all four of the bills of lading, to the shipper of the cargo and this was affirmed by the Court of Appeal and the House of Lords. In the Court of Appeal (judgment by Kennedy, L. J.) it was said:

"It does not lie in the mouth of the defendants to deny the authority of the signature as one made on behalf of the owners and captain, because they have themselves by the contract agreed that the captain shall act as the charterers shall direct, and therefore the signature which the charterers have made as on behalf of the owners and captain must, I think, be treated, when they are sued by the shippers who put their goods on board, as a signature which they cannot repudiate, because they gave the charterers, in the express terms of their contract, the right of directing the signature to

the document to be made, and must be taken impliedly to have given, both as against the captain and against themselves, an authority to the charterers to sign, on behalf of either or both of them" (pp. 406-7 of 2 K. B. 1908).

In the House of Lords in the judgment by the Lord Chancellor (Lord Loreburn) it was said:

"The other point namely, that one of the bills of lading was signed by Messrs. Watts [charterer] instead of the captain is destitute of validity in law and even more destitute—to my mind—of merits. *If the captain had been directed to sign it he would have been obliged to sign it*" (p. 408 of 1908 A. C.).

In the judgment by Lord Dunedin in the House of Lords, it was said:

"The only point remaining is whether the appellants are bound in respect of the fourth bill of lading. I am content with the judgment of Channell, J. I do not think that any new and dangerous liability, as was urged, is being imposed on owners, because it must be clearly understood that this was a bill of lading which the master could rightfully have been called on to sign" (pp. 410-411 of 1908 A. C.).

A similar state of facts is to be met with in *Wilston S. S. Co. Ltd. v. Andrew, Weir & Co.*, 31 Times Com. Cas., 111, cited at page 6 of reply brief. The Court found that the bill of lading was the contract of the ship owner, not the charterer.

In *The Manchester Trust Co. Ltd. v. Furness Withy & Co.*, 8 Asp. M. C. 57 (Court of Appeal), cited at p. 5 of reply brief, the vessel was under a time charter (not a demise) providing: "The captain and crew, although paid by the owners, shall be the agents and servants of the charterers for all purposes, whether of navigation or otherwise under this charter. In signing bills of lading it is expressly agreed that the captain shall only do so as agent for the charterers . . ." The master signed bills of lading for coal loaded at Cardiff consigned to Rio de Janeiro.

The charterers endorsed these bills of lading to the plaintiff and then induced the master to alter the destination of the ship to Buenos Aires and to deliver the cargo to themselves. The plaintiff sued the owners of the ship for non-delivery of the cargo and recovered. Judgment for the plaintiff was affirmed on appeal. In the judgment in the Court of Appeal by Lindley, L. J., it was said:

*"The plaintiffs, who are holders of the bill of lading, rely upon the general rule of law that, *prima facie* at all events, a bill of lading signed by the master is signed by the master as the servant or agent of the shipowner. Of course in the ordinary course of business that is so. * * * I cannot regard all these clauses [in the charter party] taken together without coming to the conclusion that the true view is that the master was and continued to be in fact the servant of the owners, subject to a stipulation that as between the owners and the charterers the charterers should treat him as their servant and indemnify the owners from the consequences of what the captain might do as regards signing bills of lading and so on. Now if that is the true view to take, that ends the question" (pp. 60-61).*

In the judgment of Lopes, L. J., it was said:

"The question which we have to decide and which determines everything is this, whose servant was the master when he signed the bill of lading? Was he the servant of the charterers or of the owners? I have no doubt that as regards third parties, the master was the servant of the owners. They had hired him, they paid him, they alone could dismiss him" (p. 62).

In the judgment by Rigby, L. J., it was said:

"I am of the same opinion and I have very little to add. I think the real question here may be said to be, have the shipowners—by which, of course, I mean the permanent owners, the absolute owners—given up altogether the possession and control of the ship to the charterers? I think it is impossible to read the charter without seeing that they had in many cases, at any rate, reserved to themselves the possession and control

through the master—cases that may occur almost at any moment during the whole of this time charter” (p. 62).

In the above cases, both of which were *in personam*, the shipowner was held liable because the master remained its servant. They were decided purely on the principles of master and servant.

The Home, Fed. Cas. 6657, referred to at pages 23 and 29 of the reply brief, supports respondents', rather than petitioners', contention. *It was an action for supplies furnished on the order of the charterer of the vessel who thereafter was adjudicated a bankrupt and made a composition with creditors to which libelant assented. Libelant thereafter sued the vessel and the Court held that its assent to the composition with the charterer's creditors did not release its lien against the vessel. The Court said, however:*

“Had the supplies in this case been furnished upon the order of the owners, there would be reason for insisting that the claim against the owner and the lien upon his property was but a single debt, of which the lien was but an incident, and that the release of one might operate as the discharge of the other; but there are in fact three independent though not joint debtors in this case, viz.: The charterer, the vessel, and the master, and the release of one does not impair the remedy against the others. The case does not differ from that of a debt against the maker of a note, secured by an indorsement, in which case it is now settled that the act of a creditor consenting to a composition does not discharge the surety” (pp. 446-7 of 12 Fed. Cas.).

It is noteworthy that General Admiralty Rule XII mentioned by Brown, D. J., in the above case, concerning the remedy of a material man or one furnishing supplies or repairs to a vessel, has since been amended to provide that the “libelant may proceed in rem against the ship and freight and/or in personam against any party liable”. It is now Rule XIII.

The words of this Court in *The Scotland*, 105 U. S. 24, at p. 35, and in *Norwich Co. v. Wright*, 13 Wall. 104, at p. 127, quoted by petitioners in their reply brief (pp. 17, 35), refer only to the limited liability sections of the Act of 1851. Both were collision cases and involved limitation only. It is true that the limited liability provisions of the Act of 1851 (Sections 3 and 4) incorporated "the rule of the general maritime law on this point" but not so Section one dealing with liability for fire, which merely adopted an English statute (26 Geo. III, c. 86, sec. 2), which in no way related to the general maritime law. Attention was called to this difference in parentage between the first and the third and fourth sections of the Act of March 3, 1851, by Judge Goddard in *The Cabo Hatteras*, 5 Fed. Supp. 725, at p. 726.

While broad language is used in *Schooner Freeman v. Buckingham*, 18 How. 182, 189, cited at pages 26-27 of the reply brief, the holding does not sustain petitioners' position. The general owner of a vessel had given possession thereof to an owner *pro hac vice* who induced the captain to sign bills of lading for cargo which was never loaded aboard. The libelants advanced money on these bills of lading and arrested the ship under a libel *in rem*. It was held that there was no lien on the vessel and the decree for libelants below was reversed because there had never been any such union of cargo and vessel as would create such a lien. The Court said:

"We are of the opinion, that under our admiralty law, contracts of affreightment, entered into with the master, in good faith, and within the scope of his apparent authority as master, bind the vessel to the merchandise for the performance of such contracts, wholly irrespective of the ownership of the vessel, and whether the master be the agent of the general or the special owner" (p. 189).

As I read this, it means that, the effectiveness of the master's contract to bind the vessel in *rem* upon cargo being loaded aboard depends upon whether he was either the agent of the general owner or the agent of the special owner when making the contract.

On the argument I was asked by Mr. Justice Frankfurter whether I knew of any case in the House of Lords holding that, under the terms of the British Fire Statute, an owner's ship was exonerated in *rem* when the owner was exonerated in *personam*. I answered that I knew of no such case. The cases that have reached the House of Lords concerning the British Fire Statute, insofar as I have been able to ascertain, have been in *personam*. This is probably due to the fact that in England "jurisdiction of Courts of Admiralty in *rem* in matters arising out of contracts for the carriage of goods depends upon recent statutes". *Carver, Carriage of Goods by Sea*, 8th Ed., 1938, Chap. XIX, pp. 963, 965, etc., where these statutes are quoted. In general such jurisdiction, according to the "Judicature (Consolidation) Act, 1925, s. 22 (1) (reproducing previous legislation)" as quoted by Carver, extends to "any claim (1) arising out of an agreement relating to the use or hire of a ship; (2) any claim relating to the carriage of goods in a ship; (3) any claim in tort in respect of goods carried in any ship; unless it is shown to the court that, at the time of the institution of the proceedings any owner or part owner of the ship was domiciled in England" (id. p. 965).

Carver, the great British authority on carriage of goods by sea, continues after the above quotation to say:

"The object of the section of the Admiralty Court Act, 1861, now superseded by the above, was thus described by Dr. Lushington: 'The statute is remedial. The short delivery of goods brought to this country in foreign ships, or their delivery in a damaged state, the goods being the property of British merchants, was frequently a grievance—an injury without any practical remedy; for the owners of such vessels being resident abroad, no action could successfully be brought

in a British tribunal, and to send the British merchant, who had sustained a loss, to commence a suit before a foreign tribunal, and probably in a distant country, could not be deemed a practical and effectual remedy. And this enactment, therefore, was intended to operate by enabling the party aggrieved to have recourse to the arrest of the ship bringing goods delivered short, or damaged, in cases where, from the absence of the defendant in foreign parts, the common law tribunals could not afford effectual redress' (i)" (p. 965).

And in Section 690 at page 970, the same authority says:

"It does not appear to have been decided whether the remedy *in rem* against the ship for damage to goods, or for breach of contract of carriage, is given in cases where there would be no right of action against the shipowner himself.

But it is at least open to doubt whether it was intended that the *res* of the shipowner should be liable to compensate wrongs for which he would not be personally answerable (k). And the provision in the Act of 1925, which limits the jurisdiction to cases in which there is no owner domiciled in England or Wales, appears to show that that result was not intended. For, otherwise, a difference of *liability* would be imposed on owners living abroad, and owners living in England.

Where the ship has been chartered, or let, to persons who are allowed to have the control of her for the time being, and who are personally liable for the claim which is made, the remedy against the ship is perhaps available, though her owners may not be liable. The point does not seem to have been decided. If in such a case the claim were based upon a maritime lien, the authorities show that the ship could be proceeded against (l). But as the claims we are con-

(i) Carver's note: "The St. Cloud (1863), 8 L. T. 54, at p. 55."

(k) Carver's note: "Cf. The Castlegate, 62 L. J. P. C. 17; (1893) A. C. 38; 7 Asp. M. C. 284; The Utopia, 62 L. J. P. C. 118; (1893) A. C. 492. See *infra*, sect. 701."

(l) Carver's note: "The Ticonderoga (1857), Swabey, 215; The Lemington (1874), 2 Asp. M. C. 475; The Tasmania (1888), 57 L. J. Adm. 49; 13 P. D. 110; The Ripon City, 66 L. J. P. 110; (1897) P. 226. Cf. The Seahard (1903), 119 Fed. Rep. 375."

sidering do not give rise to maritime liens, the proceeding *in rem* must be justified, if at all, by the words of the Act; and it seems unlikely that those words were intended to give a remedy against the owners, in effect, which would not otherwise exist (m)."

And in Section 694 at page 975, the same authority says:

"694. The remedy *in rem*, then, given by the Admiralty Court Acts for claims arising under contracts of carriage, is not founded upon a maritime lien. But it enables the claimant to arrest and detain the property; and gives him a charge upon it, subject to other prior claims, from the time of the arrest. The object of the statute is only to found a jurisdiction against the owner who is liable for the damage; and to give the security of the ship, the *res*, from the time of the arrest' (k)" (p. 975).

While in Section 695 at page 976, the same authority says:

"695. It appears, then, that the remedies *in rem*, which we are discussing, can only be availed of against the ship and freight on the one hand, and against the cargo on the other, so long or so far only as they continue at the time of arrest to be the property of the person who is personally liable for the damage, or breach of duty complained of" (p. 976).

Inasmuch as the British Fire Statute, which is s. 502 of the "Merchants Shipping Act, 1894", is restricted to "the owner of a British seagoing ship", such an owner was usually found to be domiciled in England and, therefore, the Judicature Act, giving a right to suit *in rem* was inapplicable.

(m) Carver's note: "In the United States it appears to be the law that the *ship* is liable for the performance of contracts made by the master, within the scope of his apparent authority, whether he is acting as agent for the owner of the ship, or on behalf of the charterer, or other person who is allowed to have control of the ship for the time being: Hickox v. Buckingham (1855), 18 Howard, 182 (Supreme Court)."

(k) Carver's note: "The *pieve Supérieure* (1874), L. R. 5 P. C. 482, p. 491."

The most recent decision of the House of Lords involving the British Fire Statute, *Louis Dreyfus & Co., Appellants, v. Tempus Shipping Company, Respondents* [1931] A. C. 726, shows the liberal spirit with which that Statute is interpreted. It was a suit by shipowners against cargo owners for general average contributions incurred as the result of a fire in cargo on board a ship and a counter-claim by such cargo owners for damage to their cargo in the fire which was alleged to have been caused by the ship's unseaworthiness. The trial court found that the fire was due to unseaworthiness and gave judgment against the shipowners on their claim for general average contributions and against the cargo owners on their counterclaim for damage to their cargo by fire.

The Court of Appeal [1931] 1 K. B. 195, reversed the decision of the trial court on the shipowners' claim for general average contributions and affirmed its decision on cargo owner's counterclaim. The House of Lords affirmed the decision of the Court of Appeal, both in respect to the shipowners' claim and the cargo owners' counterclaim, [1931] A. C. 726.¹

The statute under consideration was s. 502 of the Merchants Shipping Act, 1894,² reading as follows:

"Liability of Shipowners:

502. The owner of a British seagoing ship, or any share therein, shall not be liable to make good to any extent whatever any loss or damage happening without his actual fault or privity in the following cases; namely,—

(i) where any goods, merchandise or other things whatsoever taken in or put on board the ship are lost or damaged by reason of fire on board the ship;"

¹ This decision was considered and discussed by this Court in *Earle & Stoddart v. Wilson Line (The Galileo)*, 287 U. S. 420, footnote 1 at p. 425.

² The British Merchants Shipping Act, 1894, 57 & 58 Vict., c. 60, is printed in Appendix III of *Scrutton on Charter Parties and Bills of Lading*, 14th Ed., pp. 537-549.

The House of Lords held this provision was broad enough not only to protect the shipowners from cargo loss by fire, but also affirmatively to collect general average contributions from cargo owners made because of said fire.

In the judgment by Viscount Dunedin, it was said:

"Now s. 502 says that, if fire is the cause of the trouble, there is no actionable wrong committed by the shipowner, however much he may have caused the fire; and by decision (which here again I have already approved) this is explained to embrace fire when caused by unseaworthiness. Therefore in this case there is no actionable wrong in what the shipowner did, and consequently the answer to the exception is not a good one, just as was found in *The Carron Park and Milburn*" (pp. 738-9).

In the judgment of Lord Warrington of Clyffe, it was said:

"In the present case the loss of or damage to the appellants' cargo happened by reason of fire on board the ship and without any actual fault or privity on the part of the respondents the shipowners. The shipowners were therefore completely freed from any liability to make good such loss or damage" (p. 741).

In the judgment of Lord Atkin, it was said:

"The statute, then, is not dealing with average, but it is dealing with actionable fault, and, as the suggested defence to the claim for contribution is actionable fault of the claimant, the statute defeats such a defence" (p. 751).

This case expressly approved the decisions of the Court of Appeal in *Virginia-Carolina Chemical Co. v. Norfolk & American Steam Shipping Co.*, 1 K. B. 229, and *Ingram & Royle Ltd. v. Services Maritimes du Tréport*, 1 K. B. 541. In view of its liberal interpretation of the Statute can it be doubted that the Court would have exonerated the ship from liability had there been any such liability?

The Munaires, 12 F. Supp. 913, cited at page 20 of petitioners' reply brief, was in the Eastern District of Louisiana (within the Fifth Circuit) and the Court declined to follow the holding of its own Circuit Court of Appeals in the *Etna Maru*, 33 F. (2d) 232. One of counsel for petitioners herein was advocate for cargo owners in the *Etna Maru*, *supra*, and I was advocate for the ship. The holding of the Court in that case that the Fire Statute did not exonerate the owner's ship even where the owner was free from personal negligence was *sua sponte* and has never been followed in any other case. Petitioners have not attempted to justify the doctrine of that case in either their main brief, reply brief or argument herein. The main doctrine of the case was expressly disapproved by this Court, opinion by Mr. Justice Brandeis, in *Earle & Stoddart, Inc. v. Ellerman's Wilson Line, Ltd. (The Galileo)*, 287 U. S. 420 (footnote 3 on p. 427), and cast doubt upon its holding that the Fire Statute did not exonerate a vessel from liability *in rem* by calling attention in the same note to *The Rapid Transit*, 52 F. 320. In view of this fact and of the otherwise continuous line of decisions in the lower federal courts, all involving suits *in rem*, in which the Fire Statute has been held to exonerate the ship, as well as its owner, from liability for cargo damage by fire, it is submitted that the doctrine for which the *Etna Maru* has been cited should be now expressly disapproved. The construction of the Fire Statute in the Circuit Court of Appeals below is in accordance with the uniform holding of the courts of that circuit since 1857 when *Dill v. The Bertrabi*, Fed. Cas. 3910, was decided by Judge Betts; this construction has been so well understood that the point is rarely raised in the courts of that circuit. This explains why in *The Salvore*, 60 F. (2d) 683, and *The Older*, 65 F. (2d) 359, there was no discussion of the point. The Circuit Court of Appeals below construed the Statute exactly as this Court had done in *Providence & N. Y. S. S. Co. v. Hill Mfg. Co.*, 109 U. S. 578, cited at length in my main brief (pp. 13-15), where, in dealing with the effect

of a restraining order issued out of the United States District Court for the Southern District of New York in 1872 in a cause of limitation of liability and which, therefore, was in the nature of an *in rem* proceeding, it was held that, "*In all cases of loss by fire, not falling within the exception, the exemption from liability is total*" (p. 602).

No fiction of a master's contract of affreightment, separate and apart from that of the owner or bareboat charterer, which petitioners now raise in this Court for the first time should be allowed to obscure the realities of the case. The cargo's lien upon the ship does not in any case arise out of the making of a so-called "master's contract"; it arises out of the fact that the cargo was loaded on board the ship. There is no lien until the cargo has been loaded, no matter who signed the contract; there is a lien as soon as the cargo has been loaded no matter who signed the contract. *Krauss Bros. Lumber Co. v. Dominion S. S. Corporation*, 290 U. S. 117; *Osaka Shosen Kaisha v. Pacific Export Lumber Co.*, 260 U. S. 490; *The Saturnus* (C. C. A. 2d), 250 F. 407; *The Esrom* (C. C. A. 2d), 272 F. 266; *The Themis* (C. C. A. 2nd), 275 F. 254; *The Pognan* (D. C. S. D. N. Y.), 276 F. 418. The authority of the master has lessened as communication with his principal has become easier and quicker; it is not as great today as it was in 1834 when *The Phœbe* (Fed. Cas. No. 11,064) was decided. A reversal of the decree below would be a change of the law as construed for the past 92 years and would be contrary to legislative intent.

October 25, 1943.

Respectfully submitted,

GEORGE C. SPRAGUE,
Counsel for Respondents.

(Emphasis throughout is mine.)

IN THE
Supreme Court of the United States
OCTOBER TERM, 1942.

No. 881. 32

In the Matter
of the

Petition of KABUSHIKI KAISHA KAWASAKI ZOSENJO, Owner,
and KAWASAKI KISEN KABUSHIKI KAISHA, Bareboat
Charterer of the steamship "VENICE MARU", for Exon-
eration from and Limitation of Liability.

CONSUMERS IMPORT CO., INC., *et al.*,
Cargo Claimants-Petitioners,

KABUSHIKI KAISHA KAWASAKI ZOSENJO and KAWASAKI
KISEN KABUSHIKI KAISHA,
Respondents.

Motion to Enlarge the Scope of the Argument.

D. ROGER ENGLAR,
T. CATESBY JONES,
EZRA G. BENEDICT FOX,
THOMAS H. MIDDLETON,
Proctors for Petitioners.

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IN THE
Supreme Court of the United States
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KISEN KABUSHIKI KAISHA,
Respondents.

Motion to Enlarge the Scope of the Argument.

*To the Honorable the Chief Justice and the Associate
Justices of the Supreme Court of the United States:*

On May 10, 1943, this Court granted a petition for
certiorari in this case, but only as to the fifth question
presented in the petition, which is as follows (p. 18):

"V. Does the Fire Statute extinguish maritime
liens for cargo damage or is its operation confined
to *in personam* liability only?"

The petitioners respectfully move this Court to enlarge
the scope of the argument so as to permit argument of

the fourth question presented by the petition, which is as follows (p. 17):

"IV. If a mere showing of loss by fire is sufficient to throw the burden of proof of negligence on the owner of cargo, is not this burden sustained by showing that the shipowner knowingly received for carriage on a general ship a large quantity of a cargo which he knew involved an abnormal fire hazard and the transportation of which the shipowner knew was still in the experimental stages?"

1. This question of law is presented squarely on the findings below. The courts below found that the cargo of fish meal in which the fire broke out was known to the carrier to create a fire hazard (R. 2043, 2045, 1984, 1986); that its carriage was still in the experimental stage (R. 2045, 2049, 1984); that a safe method of carrying such a large quantity was not established until the year after this disaster (R. 2041, 2045, 2049, 1984); that the stowage of this cargo on the vessel was negligent and rendered her unseaworthy (R. 2048, 1985, 1988); and that this improper stowage was the proximate cause of the fire and of the losses sustained by the petitioners (R. 2048, 1985, 1989). Notwithstanding their finding that the carrier had knowledge of the danger involved in the carriage of this cargo, the lower courts held that the owners of cargo had not sustained the burden of proof resting on them under the Fire Statute, (46 U. S. Code, Sec. 182); but that they must go further and prove knowledge on the part of the carrier that its employees had not corrected the dangerous condition (R. 2046). The burden thus imposed on the cargo owners has no counterpart in any other jurisdiction, and this deviation is squarely in conflict with the law as applied in other Circuits. In all other jurisdictions, a carrier who has knowledge of a condition involving danger of fire is under a personal obligation to see that the condition is corrected. This obligation is not satisfied merely by the appointment of competent subordinates. Put in another

way, if the carrier has knowledge of a condition which involves the danger of fire and this condition is not corrected, the inaction is chargeable to the carrier whether he has personal knowledge of it or not; the rule of *respondeat superior*, which is conditionally suspended by the Fire Statute (46 U. S. Code Sec. 182), comes into operation once more when the carrier learns of the danger of fire.

2. While failure of this Court to grant a writ of certiorari may not give rise to any presumption as to the merits of a case, we submit that if the Court takes up the present case and does not hear argument on the above question, it will be generally regarded as an affirmance of the decision below on this point and will not only result in a continuance of the present rule in the Second Circuit, but will probably result in that rule being adopted in the other Circuits where the contrary rule has heretofore been applied. We submit that a question of this importance, which has never been either discussed or decided in any opinion of this Court, should not be disposed of without a hearing and argument.

3. In support of our statement that the burden imposed upon the cargo owner in this case is without precedent, we call the Court's attention to the specific findings of the lower courts that the carrier had knowledge of numerous earlier fires in similar cargoes on its own vessels (R. 2043, 2045, 1984, 1986), and that it did not pass this information on to the Lloyd's surveyor, one Fegen, (R. 2043, 1986), whom it employed to supervise the stowage (R. 2043, 1985). The carrier offered no evidence as to Fegen's actual knowledge of these earlier fires. Nevertheless, the lower courts held that the cargo owners must fail in any event because they could not prove what effect this information would have had on Fegen's judgment if it had been passed on to him.

We quote from the opinion of the Circuit Court of Appeals as follows:

*"Besides, even if it was negligent not to inform him, it does not appear that Fegen did not inform himself; or that, if he did not, his ignorance made any difference; i.e., that his knowledge of the charterer's past experience would have led him to discard rice ventilators." Since the claimants have the burden of proving 'neglect' under this statute—unlike the Limited Liability Statute—they must in any event fail upon this issue, for by no stretch can it be said that they proved that the fire was 'caused' by Fegen's ignorance of the charterer's past experience. *The Strathdon*, 89 Fed. Rep. 374, 378; *The Salvore*, 60 Fed. (2) 683 (C. C. A. 2); *The Older*, 65 Fed. (2) 359 (C. C. A. 2)" (R. 2046). (Italics ours.)*

As appears from the foregoing quotation (R. 2046), the lower courts here held that the carrier, which knew from actual experience of the fire hazard involved, could divest itself of all responsibility by delegating its duties to a Lloyd's surveyor, without taking any steps to ascertain whether he had knowledge of the dangers involved in this experimental traffic, and without making any inquiries as to what, if any, steps he took to avoid the danger of fire. This ruling is contrary to the law as applied in all other Circuits where the question has arisen. Specifically, the opposite rule was applied by the Circuit Court of Appeals for the Ninth Circuit in *Williams S. S. Co. v. Wilbur*, 9 F. (2d) 622, 623, and by the Circuit Court of Appeals for the Fourth Circuit in *Bank Line v. Porter*, 25 F. (2d) 843, 845.

The *Bank Line* case, *supra*, is peculiarly pertinent, for in that case, as here, the carrier claimed immunity under the Fire Statute because it had employed a Lloyd's surveyor to pass on the seaworthiness of the vessel; and there, as here, the carrier failed to inform the surveyor

of material facts within its knowledge. We quote from that opinion as follows:

"It is contended, on the part of the respondent, that the certificate of seaworthiness issued by Lloyd's surveyor at Calcutta was sufficient to absolve the owner from any neglect with regard to the condition of the *Poleric*. We cannot agree with this contention. The owner was in possession of information respecting the history of the vessel's voyage from Greenock to Calcutta that should have been communicated to Lloyd's surveyor. This was not done.

The diligence required is 'diligence with respect to the vessel, not in obtaining certificates'. *The Abbazia* (D. C.) 127 F. 495; *Compagnie Maritime Francaise v. Meyer* (C. C. A.) 248 F. 881." (25 F. (2d) at p. 845).

In addition, the court held that where a carrier has knowledge of "a condition involving a danger of fire", it is under a duty to see that proper precautions are taken, and that neglect in preventing "the very thing that did occur, the breaking out of the numerous fires *** is directly chargeable to the owner". The court said (p. 845):

"In this case, as in the case of *The Elizabeth Dantzler*, 263 F. 596, we are of the opinion that, taking into consideration the nature of the cargo and climatic conditions at Ponta Delgada, the fire was reasonably to be feared and provided against, if not to be expected. All these facts were in possession of the owners of the *Poleric*; their agents were on the ground, and no steps taken to prevent the fire.* Knowledge of facts that may be reasonably expected to lead to certain results imposes a direct liability for those results. *The Eastern Glade* (C. C. A.) 13 F. (2d) 555; *Willfaro-Willsolo* (D. C.) 9 F. (2d) 940." (Italies ours.) (25 F. (2d) at pp. 845-6.)

The foregoing quotations disclose a definite, clear-cut conflict between the Second and Fourth Circuits as to the

conditions under which a carrier is entitled to exemption from liability by the Fire Statute. In the Fourth Circuit, when the cargo owner establishes actual knowledge on the part of a carrier of conditions which may reasonably be expected to result in a fire, the carrier, in order to obtain the exemption granted by the statute, must then show not merely that it appointed proper subordinates, but that its subordinates were fully informed of the danger and took proper steps to avoid it.

In the Second Circuit, on the other hand, notwithstanding that both of the lower courts concurrently found in the present case that proper steps to avoid the danger were not taken by the carrier's subordinate, they held that the delegation of duty to the subordinate relieved the carrier of all responsibility, and this although the subordinate admittedly had not been informed by the carrier of its adverse experiences in the carriage of fish meal. The lower courts held in this case that there was no duty upon the carrier to inform its subordinate of its unfavorable experience, but that cargo owners must show affirmatively that the subordinate to whom the carrier had delegated the stowage of the cargo was ignorant of the carrier's previous adverse experiences and that such ignorance was a proximate cause of the loss.

WHEREFORE, petitioners move that the scope of the argument be enlarged to permit presentation to this Court of the Fourth Question contained in the petition.

Dated, New York, N. Y., May 18, 1943.

D. ROGER ENGLAR,
T. CATESBY JONES,
EZRA G. BENEDICT FOX,
THOMAS H. MIDDLETON,
Proctors for Petitioners.

FILE COPY

CHARLES L. COOPER

Supreme Court of the United States

OCTOBER TERM 1942

No. 881

In the Matter

of the

Petition of KABUSHIKI KAISHA KAWASAKI ZOSENJO, Owner,
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terer of the Steamship "VENICE MARU", for Exoneration
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* *Cargo Claimants-Petitioners.*

KABUSHIKI KAISHA KAWASAKI ZOSENJO and

KAWASAKI KISEN KABUSHIKI KAISHA,

Respondents.

RESPONDENTS' ANSWER TO PETITIONERS' REPLY BRIEF

GEORGE C. SPRAGUE,
Counsel for Respondents.

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Respondents.

**RESPONDENTS' ANSWER TO PETITIONERS'
REPLY BRIEF.**

The question of what were "the exact words employed by Mr. Justice Miller" in the opinion of this Court in *Walker v. Transportation Co.*, (No. 110—December Term 1865) is put in issue by the last paragraph on page 2 of petitioners' reply brief. That case is reported in 3 Wallace 150, and in 18 L. ed. 172. I had mistakenly assumed that there was no difference between the two reports and, after comparing petitioners' quotation from the opinion at page 45 of the petition with the report as contained in 18 L. ed.

172, asserted that they had misquoted the language (respondents' brief p. 11).

Upon receipt of petitioners' reply brief, I compared the opinion as reported in 3 Wallace 150 with the opinion as reported in 18 L. ed. 172, and found a substantial difference between them in the language of the paragraph quoted. Petitioners' quotation of one of the two sentences contained in that paragraph is correct as reported at 3 Wallace 150, 153 but incorrect as reported at 18 L. ed. 172, 174. My quotation of all three of the sentences of that paragraph is correct as reported at 18 L. ed. 172, 174 but incorrect as reported at 3 Wallace 150, 153 in respect to two sentences. My statement that petitioners misquoted the language of the opinion *as reported at 3 Wallace 150, 153*,¹ was, therefore, an error.

In order to remove all doubt as to what this Court actually said in the paragraph under discussion, I requested the Clerk to furnish me with a certified copy of the original opinion in *Walker v. Transportation Co.*, supra, from the archives of the Court and he has done so under date of April 27, 1943. This certified copy of the opinion is printed as an appendix hereto with the paragraph under discussion emphasized for convenient reference. This certified copy clearly shows that this paragraph was incorrectly reported at 3 Wallace 150, 153 and correctly reported at 18 L. ed. 172, 174; the emphasized paragraph is identical with the quotation in respondents' brief (p. 11) except that the word "first" is spelled out in the certified copy and abbreviated ("1st") in the brief. The conclusion drawn in respondents' brief (p. 11) from that quotation is inescapable.

Petitioners' statement (reply brief p. 3) concerning the *Getsuyo Maru*, which sailed from Yokohama on June 28, is misleading. As the Circuit Court of Appeals below said:

"Nor could Okubo have done anything when he learned that the cargo of the 'Getsuyo Maru' had

¹ Emphasis throughout brief and appendix is mine unless otherwise noted.

heated. That vessel reached New York on July 29, the day that the 'Venice Maru' reached Los Angeles. There is no evidence when Okubo first learned that the meal had heated, except of course that it could not have been before the 29th. It is most unlikely that he heard of it before the 30th, the day when the 'Venice Maru' left Los Angeles. We must not clutch at such straws to find liability, or construe the Fire Statute grudgingly" (R. 2046).

That Okubo did not supervise Fegen, but left the stowage to him as an expert, is shown by the following quotation from the same opinion:

"The charterer's business was in charge of one, Okubo, who lived in Kobe, and who alone had the active direction of its affairs, although it had a president, who was inactive. Okubo knew of the previous heating of all the cargoes mentioned except those leaving in June; *he did not tell Fegen of these when he retained him, and he paid no further attention to the stowage*" (R. 2041-43).

Respectfully submitted,

GEORGE C. SPRAGUE,
Counsel for Respondents.

May 3, 1943.

APPENDIX**SUPREME COURT OF THE UNITED STATES****No. 410—DECEMBER TERM, 1865**

CHARLES H. WALKER et al.,
Appellants,
vs.
THE WESTERN TRANSPORTATION CO.

Appeal from the Circuit Court of the United States for the Northern District of Illinois.

Mr. Justice MULLER delivered the opinion of the Court.

Plaintiffs filed their libel in personum [sic], for the value of wheat shipped on board the defendant's ship *Falcon*, at Chicago, to be delivered at Buffalo.

Defendant admits the receipt of the wheat on board the vessel, and the failure to deliver, and sets up three defenses.

1. That the wheat was destroyed by fire, which was not caused by the design or neglect of defendant. This article is framed to meet the act of March 3, 1851.

2. That the wheat was received on board, with reference to the terms of the bills of lading usually given by respondent, which contained an exception of the dangers of navigation fire, and collision [sic]. No proof was offered under this article.

3. That it was received with reference to the forms of bills of lading in general use on the lakes, which contained an exception of perils of navigation, perils of the sea, and other equivalent words; and that by general and well known usage and custom, these words included loss by fire.

In setting forth the custom, in the 11th article of the answer, it is stated that the custom is to construe those words as an exemption from liability for loss by fire, unless it occurs by the negligence or misconduct of the owner of the vessel, his agents or servants. It then avers that the fire did not occur through the negligence or misconduct of respondent, or its servants or agents.

1. Is the owner of a vessel used in the trade on the lakes liable, independent of contract, for a loss by fire, which occurs without any design or neglect of the owner; although it may be traced to negligence of some of the officers or agents having charge of the vessel?

The answer to this question depends upon the construction to be given to the act of March 3, 1851, (9 U. S. Statutes 635,) entitled an act to limit the liability of ship owners, and for other purposes. That the owners of vessels were liable at common law in the case stated, had been decided by this court in the case of the New Jersey Steam Navigation Co. vs. The Merchants' Bank, 6 Howard, 344. That decision led to the enactment of the statute of 1851. This statute has been the subject of consideration in this court before, in the case of Moore and others vs. The American Transportation Co., 24 Howard, 1. The policy of the act, its relation to the act of 53 George III, and other British statutes, are there discussed; and it is decided—that being the principal question before the court—that the act embraces vessels engaged in commerce on the great northern lakes as well as on the ocean. It is quite evident that the statute intended to modify the ship owner's common law liability for every thing but the act of God and the king's enemies. We think that it goes so far as to relieve the ship owner from liability for loss by fire, to which he has not contributed either by his own design or neglect.

The language of the first section is, that no owner or owners, of any ship or vessel, shall be liable to answer for any loss or damage which may happen by reason or means

of fire on board said ship or vessel, "unless such fire is caused by the design or neglect of such owner or owners." The owners are here released from liability for loss by fire in all cases not coming within the exception. The exception is of cases where the fire can be charged to the owners' design, or the owners' neglect.

When we consider that the object of the act is to limit the liability of *owners*² of vessels, and that the exception is not in terms of negligence generally, but only of negligence of the owners, it would be a strong construction of the act, in derogation of its general purpose, to hold that this exception extends to the officers and crews of the vessels as representing the owners.

If, however, there could be any doubt upon the construction of this section standing alone, it is removed by a consideration of the sixth section of the same act. This enacts that nothing in the preceding sections shall be construed to take away, or affect the remedy to which any party may be entitled against the master, officers, or mariners of such vessel, for negligence, fraud, or other malversation. This implies that it was the purpose of the preceding sections to release the owner from some liability for conduct of the master and other agents of the owner, for which these parties were themselves liable, and were to remain so; and that is stated to be their negligence and fraud.

We are therefore, of opinion that in reference to fires occurring on that class of vessels to which the statute applies, the owner is not liable for the misconduct of the officers and mariners of the vessel in which he does not participate personally.

2. But there is a proviso to the first section of the act of 1851, which says, "that nothing in this act contained shall prevent the parties from making such contract as they please, extending or limiting the liability of such owner." It is claimed by libellants, that the answer of the

² Emphasis appears in opinion.

defendants sets out a contract which makes the owners liable in case of loss by fire, from the negligence of their officers and agents; and that by the amendment to the libel, this contract is admitted; and that the only question left in the case is the existence of such negligence. On this question, testimony was taken on both sides.

The respondent undoubtedly does set out, in the 11th article of his answer, that the wheat was received on board with the understanding that the usual bill of lading, common in that trade, should be given and accepted as the contract between the parties, and avers that such bill of lading contained a clause exempting the ship owner from liability for loss by "perils of navigation, perils of the sea, and other equivalent words;" and that by usage and custom, those words included loss by fire, unless said fire had been caused by the negligence or misconduct of the owner or his servants or agents.

This article was excepted to, as well as the other two defences we have mentioned, by libellants, in the district court in 1856, when the case was tried there; but no ruling seems to have been had on the exceptions. When the case came to the circuit court, in 1860, after the case of Moore vs. The Transportation Co., had decided that the act of 1851 was applicable to the lake trade, the libellants, perceiving the advantage to be gained by such a special contract, amended their libel and admitted it. No proof was offered of the contract or of the custom; and it may be doubted if the defendant intended to state, as an affirmative proposition, that on such bills of lading as those described, usage held the owners responsible for the negligence of their officers in cases of fire. But the custom is so stated; and the libellants admit the contract, and the construction given to it by custom.

But it is obvious that there is nothing in the language³ of such bills of lading concerning "perils of navigation and perils of the sea," which makes the owner liable for the

³ Emphasis appears in opinion.

negligence of his servants in case of loss by fire. Can usage add to words which do not express it, a liability from which the act of Congress declares the ship owner to be free? It was the common law, or immemorial usage which made him liable before the statute. That relieved him from the force of that usage or law. It cannot be that the liability can be revived by merely attaching such usage to words in a contract, which have no such meaning of themselves. The contract mentioned in the proviso, which can take a case out of the statute, is one made by the parties, not by custom. In other words, an express contract.

We do not believe, then, that the special contract set up by respondent, founded on usage, although admitted by the libellants, is founded on a custom which the law will support, and therefore the case must be governed by the act of 1851.

The construction which we have already given to that act, requires that the judgment of the circuit court, dismissing the libel, shall be affirmed, with costs.

A true copy:

Test:

CHARLES ELMORE CROPLEY, Clerk,
Supreme Court of the United States,

By HAROLD B. WILLEY
Deputy.

[Seal of the Supreme Court
of the United States]

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IN THE
Supreme Court of the United States
OCTOBER TERM 1942
No. 881

In the Matter
of the

Petition of KABUSHIKI KAISHA KAWASAKI ZOSENJO, Owner,
and KAWASAKI KISEN KABUSHIKI KAISHA, Bareboat Char-
terer of the Steamship "VENICE MARU", for Exoneration
from and Limitation of Liability.

CONSUMERS IMPORT CO., INC., et al.,
Cargo Claimants-Petitioners,

KABUSHIKI KAISHA KAWASAKI ZOSENJO and
KAWASAKI KISEN KABUSHIKI KAISHA,
Respondents.

**RESPONDENTS' ANSWER TO PETITIONERS'
REPLY BRIEF**

The question of what were "the exact words employed by Mr. Justice Miller" in the opinion of this Court in *Walker v. Transportation Co.*, (No. 110—December Term 1865) is put in issue by the last paragraph on page 2 of petitioners' reply brief. That case is reported in 3 Wallace 150, and in 18 L. ed. 172. I had mistakenly assumed that there was no difference between the two reports and, after comparing petitioners' quotation from the opinion at page 15 of the petition with the report as contained in 18 L. ed.

172, asserted that they had misquoted the language (respondents' brief p. 11).

Upon receipt of petitioners' reply brief, I compared the opinion as reported in 3 Wallace 150 with the opinion as reported in 18 L. ed. 172, and found a substantial difference between them in the language of the paragraph quoted. Petitioners' quotation of one of the two sentences contained in that paragraph is correct as reported at 3 Wallace 150, 153 but incorrect as reported at 18 L. ed. 172, 174. My quotation of all three of the sentences of that paragraph is correct as reported at 18 L. ed. 172, 174 but incorrect as reported at 3 Wallace 150, 153 in respect to two sentences. My statement that petitioners misquoted the language of the opinion *as reported at 3 Wallace 150, 153*,¹ was, therefore, an error.

In order to remove all doubt as to what this Court actually said in the paragraph under discussion, I requested the Clerk to furnish me with a certified copy of the original opinion in *Walker v. Transportation Co.*, supra, from the archives of the Court and he has done so under date of April 27, 1943. This certified copy of the opinion is printed as an appendix hereto with the paragraph under discussion emphasized for convenient reference. This certified copy clearly shows that this paragraph was incorrectly reported at 3 Wallace 150, 153 and correctly reported at 18 L. ed. 172, 174; the emphasized paragraph is identical with the quotation in respondents' brief (p. 11) except that the word "first" is spelled out in the certified copy and abbreviated ("1st") in the brief. The conclusion drawn in respondents' brief (p. 11) from that quotation is inescapable.

Petitioners' statement (reply brief p. 3) concerning the *Getsuyo Maru*, which sailed from Yokohama on June 28, is misleading. As the Circuit Court of Appeals below said:

"Nor could Okubo have done anything when he learned that the cargo of the 'Getsuyo Maru' had

¹ Emphasis throughout brief and appendix is mine unless otherwise noted.

heated. That vessel reached New York on July 29, the day that the 'Venice Maru' reached Los Angeles. There is no evidence when Okubo first learned that the meal had heated, except of course that it could not have been before the 29th. It is most unlikely that he heard of it before the 30th, the day when the 'Venice Maru' left Los Angeles. We must not clutch at such straws to find liability, or construe the Fire Statute grudgingly" (R. 2046).

That Okubo did not supervise Fegen, but left the stowage to him as an expert, is shown by the following quotation from the same opinion:

"The charterer's business was in charge of one, Okubo, who lived in Kobe, and who alone had the active direction of its affairs, although it had a president, who was inactive. Okubo knew of the previous heating of all the cargoes mentioned except those leaving in June; *he did not tell Fegen of these when he retained him, and he paid no further attention to the stowage*" (R. 2041-43).

Respectfully submitted,

GEORGE C. SPRAGUE,
Counsel for Respondents.

May 3, 1943.

APPENDIX

SUPREME COURT OF THE UNITED STATES

No. 110—DECEMBER TERM, 1865

CHARLES H. WALKER et al.,
Appellants,
vs.
THE WESTERN TRANSPORTATION CO.

Appeal from the Circuit Court of the United States for the Northern District of Illinois.

Mr. Justice MILLER delivered the opinion of the Court.

Plaintiffs filed their libel in personum [sic], for the value of wheat shipped on board the defendant's ship *Falcon*, at Chicago, to be delivered at Buffalo.

Defendant admits the receipt of the wheat on board the vessel, and the failure to deliver, and sets up three defenses.

1. That the wheat was destroyed by fire, which was not caused by the design or neglect of defendant. This article is framed to meet the act of March 3, 1851:

2. That the wheat was received on board, with reference to the terms of the bills of lading usually given by respondent, which contained an exception of the dangers of navigation fire, and collision [sic]. No proof was offered under this article.

3. That it was received with reference to the forms of bills of lading in general use on the lakes, which contained an exception of perils of navigation, perils of the sea, and other equivalent words; and that by ~~general~~ and well known usage and custom, these words included loss by fire.

In setting forth the custom, in the 11th article of the answer, it is stated that the custom is to construe those words as an exemption from liability for loss by fire, unless it occurs by the negligence or misconduct of the owner of the vessel, his agents or servants. It then avers that the fire did not occur through the negligence or misconduct of respondent, or its servants or agents.

1. Is the owner of a vessel used in the trade on the lakes liable, independent of contract, for a loss by fire, which occurs without any design or neglect of the owner; although it may be traced to negligence of some of the officers or agents having charge of the vessel?

The answer to this question depends upon the construction to be given to the act of March 3, 1851, (9 U. S. Statutes 635,) entitled an act to limit the liability of ship owners, and for other purposes. That the owners of vessels were liable at common law in the case stated, had been decided by this court in the case of the New Jersey Steam Navigation Co. vs. The Merchants' Bank, 6 Howard, 344. That decision led to the enactment of the statute of 1851. This statute has been the subject of consideration in this court before, in the case of Moore and others vs. The American Transportation Co., 24 Howard, 1. The policy of the act, its relation to the act of 53 George III, and other British statutes, are there discussed; and it is decided—that being the principal question before the court—that the act embraces vessels engaged in commerce on the great northern lakes as well as on the ocean. It is quite evident that the statute intended to modify the ship owner's common law liability for every thing but the act of God and the king's enemies. We think that it goes so far as to relieve the ship owner from liability for loss by fire, to which he has not contributed either by his own design or neglect.

The language of the first section is, that no owner or owners, of any ship or vessel, shall be liable to answer for any loss or damage which may happen by reason or means,

of fire on board said ship or vessel, "unless such fire is caused by the design or neglect of such owner or owners." The owners are here released from liability for loss by fire in all cases not coming within the exception. The exception is of cases where the fire can be charged to the owners' design, or the owners' neglect.

When we consider that the object of the act is to limit the liability of *owners²* of vessels, and that the exception is not in terms of negligence generally, but only of negligence of the owners, it would be a strong construction of the act, in derogation of its general purpose, to hold that this exception extends to the officers and crews of the vessels as representing the owners.

If, however, there could be any doubt upon the construction of this section standing alone, it is removed by a consideration of the sixth section of the same act. This enacts that nothing in the preceding sections shall be construed to take away, or affect the remedy to which any party may be entitled against the master, officers, or mariners of such vessel, for negligence, fraud, or other malversation. This implies that it was the purpose of the preceding sections to release the owner from some liability for conduct of the master and other agents of the owner, for which these parties were themselves liable, and were to remain so; and that is stated to be their negligence and fraud.

We are therefore, of opinion that in reference to fires occurring on that class of vessels to which the statute applies, the owner is not liable for the misconduct of the officers and mariners of the vessel in which he does not participate personally.

2. But there is a proviso to the first section of the act of 1851, which says, "that nothing in this act contained shall prevent the parties from making such contract as they please, extending or limiting the liability of such owner." It is claimed by libellants, that the answer of the

² Emphasis appears in opinion.

defendants sets out a contract which makes the owners liable in case of loss by fire, from the negligence of their officers and agents; and that by the amendment to the libel, this contract is admitted; and that the only question left in the case is the existence of such negligence. On this question, testimony was taken on both sides.

The respondent undoubtedly does set out, in the 11th article of his answer, that the wheat was received on board with the understanding that the usual bill of lading, common in that trade, should be given and accepted as the contract between the parties, and avers that such bill of lading contained a clause exempting the ship owner from liability for loss by "perils of navigation, perils of the sea, and other equivalent words;" and that by usage and custom, those words included loss by fire, unless said fire had been caused by the negligence or misconduct of the owner or his servants or agents.

This article was excepted to, as well as the other two defences we have mentioned, by libellants, in the district court in 1856, when the case was tried there; but no ruling seems to have been had on the exceptions. When the case came to the circuit court, in 1860, after the case of Moore vs. The Transportation Co. had decided that the act of 1851 was applicable to the lake trade, the libellants, perceiving the advantage to be gained by such a special contract, amended their libel and admitted it. No proof was offered of the contract or of the custom; and it may be doubted if the defendant intended to state, as an affirmative proposition, that on such bills of lading as those described, usage held the owners responsible for the negligence of their officers in cases of fire. But the custom is so stated, and the libellants admit the contract, and the construction given to it by custom.

But it is obvious that there is nothing in the language³ of such bills of lading concerning "perils of navigation and perils of the sea," which makes the owner liable for the

³ Emphasis appears in opinion.

negligence of his servants in case of loss by fire. Can usage add to words which do not express it, a liability from which the act of Congress declares the ship owner to be free? It was the common law, or immemorial usage which made him liable before the statute. That relieved him from the force of that usage or law. It cannot be that the liability can be revived by merely attaching such usage to words in a contract, which have no such meaning of themselves. The contract mentioned in the proviso, which can take a case out of the statute, is one made by the parties, not by custom. In other words, an express contract.

We do not believe, then, that the special contract set up by respondent, founded on usage, although admitted by the libellants, is founded on a custom which the law will support, and therefore the case must be governed by the act of 1851.

The construction which we have already given to that act, requires that the judgment of the circuit court, dismissing the libel, shall be affirmed, with costs.

A true copy:

Test:

CHARLES ELMORE CROPLEY, Clerk,
Supreme Court of the United States.

By HAROLD B. WILLEY

Deputy.

[Seal of the Supreme Court
of the United States.]

SUPREME COURT OF THE UNITED STATES.

No. 32.—OCTOBER TERM, 1943.

Consumers Import Co., Inc., et al.,
Petitioners,
vs.
Kabushiki Kaisha Kawasaki Zosenjo,
et al. } On Writ of Certiorari to
the United States Circuit
Court of Appeals for the
Second Circuit.

[November 8, 1943]

Mr. Justice JACKSON delivered the opinion of the Court.

Petitioners, Consumers Import Company, and others hold bills of lading covering several hundred shipments of merchandise. The shipments were damaged or destroyed by fire or by the means used to extinguish fire on board the Japanese ship *Venice Maru* on August 6, 1934, on voyage from Japan to Atlantic ports of the United States. Respondent Kabushiki Kaisha Kawasaki Zosenjo owned the *Venice Maru* and let her to the other respondent, Kawasaki Kisen Kabushiki Kaisha, under a bareboat form of charter. The latter was operating her as a common carrier.

Damage to the cargo is conceded from causes which are settled by the findings below, which we decline to review.¹ Upwards of 660 tons of sardine meal in bags was stowed in a substantially solid mass in the hold. In view of its susceptibility to heating and combustion it had inadequate ventilation. As the ship neared the Panama Canal, fire broke out, resulting in damage to cargo and ship. The cause of the fire is found to be negligent stowage of the fish meal, which made the vessel unseaworthy. The negligence was that of a person employed to supervise loading to whom responsibility was properly delegated and who was qualified by experience to perform the work. No negligence or design of the owner or charterer is found.

The cargo claimants filed libels, *in rem* against the ship and *in personam* against the charterer for breach of contracts of

¹ The facts are considered at length in the opinion of the Court of Appeals, 133 F. 2d 781.

carriage. The owner joined the charterer in a proceeding in admiralty to decree exemption from or limitation of liability. Stipulation and security were substituted for the ship in the custody of the court.² The District Court applied the so-called "Fire Statute" to exonerate the owner entirely and the charterer and the ship in all except matters not material to the issue here. The Circuit Court of Appeals affirmed, taking a view of the statute in conflict with that of the Fifth Circuit in *The Etna Maru*, 33 F. 2d 232. To resolve the conflict we granted certiorari expressly limited to the question, "Does the Fire Statute extinguish maritime liens for cargo damage, or is its operation confined to *in personam* liability only?"³

The Fire Statute reads: "No owner of any vessel shall be liable to answer for or make good to any person any loss or damage, which may happen to any merchandise whatsoever, which shall be shipped, taken in, or put on board any such vessel, by reason or by means of any fire happening to or on board the vessel, unless such fire is caused by the design or neglect of such owner."⁴ The statute also provides that a charterer such as we have here stands in the position of the owner for purposes of limitation or exemption of liability.⁵

Since "neglect of the owner" means his personal negligence, or in case of a corporate owner, negligence of its managing officers and agents, as distinguished from that of the master or subordinates,⁶ the findings below take the case out of the only exception provided by statute.

Apart from this inapplicable exception the immunity granted appears on its face complete. But claimants contend that because their contracts of affreightment were signed "for master" they became under maritime law ship's contracts, independently

² Admiralty Rule 51.

The Alien Property Custodian on July 30, 1942, vested in himself all property in the United States of respondent Kawasaki Kisen Kabushiki Kaisha. Vesting Orders 77 and 80, 7 Federal Register 7048, 7049. On March 15, 1943, he vested in himself all property of Tokyo Marine & Fire Insurance Co. Ltd., a Japanese corporation which advanced cash collateral to the surety who became such in the *ad interim* stipulation. Vesting Order 1084, 8 Federal Register 3647.

³ — U. S. —.

⁴ Act of March 3, 1851, § 1, now 46 U. S. C. § 182, formerly R. S. § 4282.

⁵ Act of March 3, 1851, § 5, now 46 U. S. C. § 186.

⁶ Walker v. Transportation Co., 3 Wall. 150; Craig v. Continental Ins. Co., 141 U. S. 638, 647; Earle & Stoddart v. Ellerman's Wilson Line, 287 U. S. 420, 424.

of any owners' contracts, and that the ship itself stands bound to the cargo though the owner may be freed. It seems unnecessary to examine the validity of the claim that apart from the statute claimants under the circumstances would have a lien on the vessel, or to review the historical development of the fiction that the ship for some purposes is treated as a jural personality apart from that of its owner. If we assume that the circumstances are appropriate otherwise for such a lien as claimants assert, it only brings us to the question whether the Fire Statute cuts across it as well as other doctrines of liability and extinguishes claims against the vessel as well as against the owner.

The provision here in controversy is Section 1 of the Act of March 3, 1851. Despite its all but a century of existence, the contention here made has never been before this Court. Sections 3 and 4 of the same Act in other circumstances provided limitations of liability, and as to them a question was considered by this Court in *The City of Norwich*, 118 U. S. 468, 502 (1886), stated thus: "It is next contended that the act of Congress does not extend to the exoneration of the ship, but only exonerates the owners by a surrender of the ship and freight, and, therefore, that the plea of limited liability cannot be received in a proceeding *in rem*." The Court rejected the contention and held that when the owner satisfied the limited obligation fixed on him by statute, owner and vessel were both discharged. The Court said that "To say that an owner is not liable, but that his vessel is liable, seems to us like talking in riddles." The riddle after more than half a century repeated to us in different context does not appear to us to have improved with age.

In the meantime, with the exception of *The Etna Maru*, the lower federal courts have uniformly construed the statute as exonerating the ship as well as the owner.⁷ We would be reluctant to overturn an interpretation supported by such consensus of opinion among courts of admiralty, even if its justification were more doubtful than this appears.⁸

⁷ *Dill v. The Bertram*, Fed. Cas. 3910; *Keene v. The Whistler*, Fed. Cas. 7645; *The Rapid Transit*, 52 Fed. 320; *The Salvore*, 60 F. 2d 683; *The Oldie*, 65 F. 2d 359; *The President Wilson*, 5 F. Supp. 684; see *Earle & Stoddart v. Ellerman's Wilson Line*, 287 U. S. 420, 427, n. 3; *The Buckeye State*, 39 F. Supp. 344, 346-47.

⁸ See *United States v. Ryan*, 284 U. S. 167, 174; *Missouri v. Ross*, 299 U. S. 72, 75.

Petitioners say, however, that such of these decisions as are not distinguishable were "ill-considered." We think that the better reason as well as the weight of authority refutes petitioners. To sustain their contention would deny effect to the Fire Statute as an immunity and convert it into a limitation of liability to the value of the ship. This is what Congress did in other sections of the same Act⁹ and elsewhere,¹⁰ which suggests that it used different language here because it had a different purpose to accomplish. Congress has said that the owner shall not "answer for" this loss in question. Claimant says this means in effect that he shall answer only with his ship. But the owner would never answer for a loss except with his property, since execution against the body was not at any time in legislative contemplation. There could be no practical exoneration of the owner that did not at the same time exempt his property. If the owner by statute is told that he need not "make good" to the shipper, how may we say that he shall give up his ship for that very purpose? It seems to us that Congress has, with the exception stated in the Act, extinguished fire claims as an incident of contracts of carriage, and that no fiction as to separate personality of the ship may revive them. There may, of course, be a waiver of the benefits of the Fire Statute, but none is present in this case.

Claimants urge that the statute as construed goes beyond any other exemption from liability for negligence allowed to a common carrier, and that it should therefore be curtailed by strict construction. We think, however, that claimants' contention would result in a frustration of the purpose of the Act.

At common law the shipowner was liable as an insurer for fire damage to cargo.¹¹ We may be sure that this legal policy of annexing an insurer's liability to the contract of carriage loaded the transportation rates of prudent carriers to compensate the risk. Long before Congress did so, England had separated the insurance liability from the carrier's duty.¹² To

⁹ §§ 2, 3, Act of March 3, 1851.

¹⁰ Harter Act of February 13, 1893, 46 U. S. C. §§ 190-96.

¹¹ New Jersey Steam Navigation Co. v. Merchants' Bank, 6 How. 344, 351. The Act of March 3, 1851, followed soon after and probably was enacted in consequence of this decision. See The Great Western, 118 U. S. 520, 533.

¹² This Court has heretofore pointed out that the Act of March 3, 1851 was patterned on English statutes, including Act of George II, c. 15, passed in

enable our merchant marine to compete, Congress enacted this statute.¹³ It was a sharp departure from the concepts that had usually governed the common carrier relation, but it is not to be judged as if applied to land carriage, where shipments are relatively multitudinous and small and where it might well work injustice and hardship. The change on sea transport seems less drastic in economic effects than in terms of doctrine. It enabled the carrier to compete by offering a carriage rate that paid for carriage only, without loading it for fire liability. The shipper was free to carry his own fire risk, but if he did not care to do so it was well known that those who made a business of risk-taking would issue him a separate contract of fire insurance. Congress had simply severed the insurance features from the carriage features of sea transport and left the shipper to buy each separately. While it does not often come to the surface of the record in admiralty proceedings, we are not unaware that in commercial practice the shipper who buys carriage from the shipowner usually buys fire protection from an insurance company, thus obtaining in two contracts what once might have been embodied in one. The purpose of the statute to relieve carriage rates of the insurance burden would be largely defeated if we were to adopt an interpretation which would enable cargo claimants and their subroges to shift to the ship the risk of which Congress relieved the owner. This would restore the insurance burden at least in large part to the cost of carriage and hamper the competitive opportunity it was purposed to foster by putting our law on an equal basis with that of England.

1734, and 26 George III, c. 86 (1786). See *Norwich Co. v. Wright*, 13 Wall. 104, 117, *et seq.*; *The Maine v. Williams*, 152 U. S. 122, 124.

¹³ Senator Hamlin reported the bill from the Committee on Commerce on January 25, 1851 and said, "This bill is predicated on what is now the English law, and it is deemed advisable by the Committee on Commerce that the American marine should stand at home and abroad as well as the English marine." 23 Cong. 1 Globe 332.

On February 26, 1851, speaking to the bill, Senator Hamlin said: "These are the provisions of the bill. It is true that the changes are most radical from the common law upon the subject; but they are rendered necessary first, from the fact that the English common law system really never had an application to this country, and, second, that the English Government has changed the law, which is a very strong and established reason why we should place our commercial marine upon an equal footing with hers. Why not give to those who navigate the ocean as many inducements to do so as England has done? Why not place them upon that great theatre where we are to have the great contest for the supremacy of the commerce of the world? That is what this bill seeks to do, and it asks no more." 23 Cong. 1 Globe 715.

Our conclusion is that any maritime liens for claimants' cargo damage are extinguished by the Fire Statute. In so far as the decision in *The Etna Maru* conflicts, it is disapproved, and the judgment of the court below is

Affirmed.

A true copy.

Test:

Clerk, Supreme Court, U. S.